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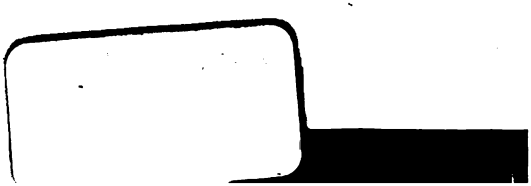

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THE TRUSTEE ACT 1893

WITH

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TRUSTEE ACT, 1893:

AN ACT

TO

Consolidate Enactments Relating to Trustees,

TOGETHER WITH

The Trustee Act, 1888,

AND

The Trust Investment Act, 1889,

WITH EXPLANATORY NOTES, NUMEROUS FORMS, AND A COMPLETE INDEX.

BY

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55 & 56 Vict. c. 13 (Act to Amend The Conveyancing Act, 1881), 10, 56, 61, 166, 169.

Abbreviations of References to Reports, &c.

App. Ca.	Appeal Cases.
Amb.	Ambler's Reports.
Anst.	Anstruther's Reports.
Atk.	Atkyn's Reports.
Beav.	Beaven's Reports.
Bing.	Bingham's Reports.
Bail Ct. Cas.	Bail Court Cases.
Bro. C. C.	Brown's Chancery Cases.
C. D.	Chancery Division.
Campb.	Campbell's Reports.
L. R., Ch.	Law Reports, Chancery Appeals.
Ch. Ca.	Cases in Chancery.
Cl. & Fin.	Clark & Finnelly's Reports.
Cr. & Ph.	Craig and Phillips's Reports.
D. & C.	Deacon & Chitty's Reports.
D. & S.	Doctor & Student.
De G. F. & J.	De Gex, Fisher & Jones's Reports.
D. G. & J.	De Gex & Jones's Reports.
De G. J. & S.	De Gex, Jones & Smith's Reports.
De G. M. & G.	De Gex, Macnaghten & Gordon's Reports.
Drew.	Drewry's Reports.
Dr.	Drury's Reports (Ireland).
Dru. & War.	Drury & Warren's Reports (Ireland).
Exch. D.	Exchequer Division.
Exch. Ca.	Exchequer Cases (Welsby, Hurlstone & Gordon's Reports).
H. L. C.	House of Lords Cases.
Ha.	Hare's Reports.
Hem. & M.	Hemming & Miller's Reports.
Ir. Law & Eq.	Irish Law & Equity Reports.
Ir. Eq. R.	Irish Law & Equity Reports.
J. & W.	Jacob & Walker's Reports.
J. & H.	Johnson & Hemming's Reports.
Jon. & Lat.	Jones & Latouche's Reports (Ireland).
Jur.	Jurist.
Jur., N. S.	Jurist (New Series).

K. & J.	Kay & Johnson's Reports.
L. J.	Law Journal.
L. T.	Law Times.
L. T., N. S., Ch.	Law Times (New Series), Chancery.
L. T.	Law Times (Old Series).
L. R., C. P.	Law Reports, Common Pleas.
L. R. Ir.	Law Reports, Ireland.
Lloyd & G.	Lloyd & Goold.
Madd.	Maddock's Reports.
M. & G.	Macnaghten & Gordon's Reports.
My. & K.	Mylne & Keene's Reports.
Mont. & A.	Montagu & Ayrton's Reports.
My. & Cr.	Mylne & Craig's Reports.
N. R.	New Reports (by Bosanquet & Fuller).
P. Wms.	Peere Williams.
Ph.	Phillips's Reports.
Q. B. D.	Queen's Bench Division.
R. S. C.	Rules Supreme Court.
Ry. & Mo.	Ryan & Moody's Reports.
Russ.	Russell's Reports (Chancery).
Russ. & My.	Russell & Mylne's Reports.
S. C.	Same Case.
S. & S.	Simons & Stuart's Reports.
Sel. C. Ca.	Selwyn's Select Cases in Chancery.
Sim.	Simons' Reports.
Sm. & G.	Smale & Gifford's Reports.
Sol. J.	Solicitors' Journal.
Swab.	Swabey's Admiralty Reports.
Vern.	Vernon's Reports.
Ves. Sen.	Vesey Senior's Reports.
Ves.	Vesey's Reports.
Ves. & Bea.	Vesey & Beames's Reports.
W. N.	Weekly Notes.
W. R.	Weekly Reporter.
White & Tudor L. C.	White & Tudor's Leading Cases.
Y. & C. Exch.	Younge & Collyer's Exchequer Equity Reports.
Y. & C. C.	Younge & Collyer's Chancery Cases.
Y. & Jerv.	Younge & Jervis's Exchequer Reports.
1893, A. C.	[1893] Appeal Cases (or as may be).
1893, 3 Ch.	[1893] 3 Ch. (or as may be).

ADDENDA ET CORRIGENDA.

Page 18. At foot of page add (See Soar *v.* Ashwell, W. N. 1893, p. 143).

Page 18. After ii., at foot of page, add Thorne *v.* Heard (1893), 3 Ch. 530.

Page 23, line 31. For Commissioners of Charitable Donations *v.* *Wybanks*, read *Wybrants*.

Page 31, line 3. For Manchester Royal Infirmary *v.* Attorney-General, *1 Ch. 423*, read *43 C. D. 420*.

Page 58, line 5. For *re* Birchall, Birchall *v.* *Aston*, read *Ashton*.

Page 60, line 35. Add *see also re Parker's Trusts, W. N. 1893, p. 119.*

Page 65, line 33. Add, *No vesting declaration is needed as to equitable interests, as the appointment of new trustees itself vests such interests.*

Page 77, line 17. Add, *This Sub-section does not extend to giving a similar power to an attorney for an absent trustee* (*re* Hetling and Merton's Contract [1893], 3 Ch. p. 269).

Page 105, line 22. For *Hutchins on Stephens* read *Hutchinson v. Stephens.*

Page 105, line 27. For *re* Gardner's *Trustees* read *Trusts.*

Page 105, line 27. After (*re Gardner's Trusts, 10 C. D. 29*) insert, *Service of a petition for vesting an outstanding legal estate was dispensed with in the case of the heir of a trustee who had long been out of the jurisdiction of the Court* (see *re* Stanley's Trusts, W. N. 1893, p. 30).

Page 106, line 23. For *re* Mundel's Trust (6 Jur., N. S., *886*), read *880*.

Page 151, line 24. After *re* Wilcock insert 34 C. D. 508.

Page 159, line 22. After *re Wulker's Mortgage Trusts* insert *3 C. D. 208.*

INTRODUCTION.

THE TRUSTEE ACT, 1893, is a much-needed consolidation of the many existing Statutes relating to Trusts and Trustees, and, as a Code of Trust Law, cannot fail to be extremely useful to Trustees and their advisers, as well as to practitioners in the Courts. This book is an attempt to elucidate the provisions of the Act by the light of the decisions on the Acts repealed and re-enacted in the new Act, and the Authors hope that it will be found of assistance to trustees and those called on to advise them.

It is one of the standing reproaches against English Law, that its rules and principles are not to be found in any Code, or even body of Statutes, but are scattered through books of reported decisions, Acts of Parliament, and even the works of ancient text-book writers. To the layman the maze seems interminable, and it is only after years of training that the lawyer even knows where to find the law, and then the best part of his knowledge is but "index lore which turns no student pale." Efforts, however, have within the last fifty years, been directed to simplifying and rendering the law more accessible. These efforts have proceeded on two main lines—first, by removing from the Statute Book legislation which has become incompatible with modern ideas, though still remaining part of the law, since no English Statute becomes obsolete merely by lapse of time; and, secondly, by codifying various branches of the law as time and opportunity have permitted. To the Statute Law Revision Committee is entrusted the first duty, while the latter has been undertaken by Parliament itself.

To codify the whole of the laws of England would be a herculean task, though there is, perhaps, some ground for thinking it not altogether an impossible one, seeing the great success which has attended the codification of law in India. The efforts of recent years, though piecemeal and halting in their mode of procedure, have, nevertheless, it must be admitted, effected much, and give promise of more systematic and extended work in the future. The Lands Clauses Act, 1845; The Bills of Exchange Act, 1882; The Companies Acts, 1862 to 1890; and The Partnership Act, 1890, are instances of attempts at codification and consolidation.

Codification of any branch of law, to be complete and perfect, should extend, not only to collection and actual re-enactment, but should also be accompanied by a legislative provision that decided cases are not to be taken as laying down the law, as they virtually do at present, but are to be used as mere aids in construing the text of the Code. But this view of codification has never been unreservedly adopted in England, and the law-makers will probably continue the work of legislation for the simplification of existing law in the same haphazard and partially effective way as hitherto.

The Act which this book attempts to elucidate is directed to codifying the Law relating to Trustees so far as it at present exists in the form of Statutes. The Act does not attempt to codify the principles which have been evolved by the decisions of Courts of Equity. These must still be sought in the numberless volumes of Law Reports.

A Bill to Codify both the Statute Law and the Case Law relating to Trusts and Trustees was indeed introduced into Parliament about two years ago, but failed to pass. The present Act is less ambitious, but its effect will be to expunge from the Statute Book a series of enactments ranging from 1796 down to the present time. That it was not made even more complete is regrettable, for it still leaves

unrepealed Sections 1 and 8 of The Trustee Act, 1888, and Sections 1 and 7 of The Trust Investment Act, 1889, which might with advantage have been repealed and re-enacted in the present Act.

The Act is styled "An Act to Consolidate Enactments Relating to Trustees"; but, as a matter of fact, it here and there enacts new law, though more as a corollary and natural effect of codifying the old law, than as the result of deliberate intention to alter or extend that law. For instance, Section 21, which replaces Section 37 of The Conveyancing Act, 1881, extends the powers of that Section to Executors.

The Act is divided into four parts, as follows:—

PART I.—INVESTMENTS.

PART II.—VARIOUS POWERS AND DUTIES OF TRUSTEES.

PART III.—POWERS OF THE COURT.

PART IV.—MISCELLANEOUS AND SUPPLEMENTAL.

As to Part I.—Sections 1 to 7 are virtually a re-enactment of the extremely useful Trust Investment Act, 1889, which widened the powers of investment of trustees to a considerable extent.

Sections 8 and 9 are a re-enactment of the very valuable and important Sections 4 and 5 of The Trustee Act, 1888, which, combined with Sections 6 and 8 of that Act, effected a revolution in trust law as to the liability of trustees for breaches of trust, and the application to them of the Statutes of Limitation. The serious depreciation in the value of real property which has taken place in recent years has brought to light many cases of investment by trustees where, with the best intentions, but with disastrous results to themselves or the beneficiaries, they had overstepped the line of caution laid down by Courts of Equity. The inability, too, of trustees

to plead the Statutes of Limitation as a defence to stale claims in respect of trusts had long been a source of considerable injustice.

It is popularly supposed that the true test of the conduct of a trustee in regard to investment and the other duties of his trust is, that he should act as an ordinarily cautious and prudent man would act in his own affairs; but it is constantly forgotten that Courts of Equity have endeavoured to define exactly in what manner such a person would, and should, act. For instance, in the matter of the advance of trust money on mortgage, the Courts, as long ago as 1836, laid down the rule that trustees ought not to lend more than two-thirds of the estimated value upon freehold agricultural property, or more than one-half of the estimated value on house property; though it constantly occurs that persons acting for themselves leave a much smaller margin, without forfeiting their claim to be considered prudent and cautious investors.

Lindley, L. J., in a recent case (*re* Whiteley, Whiteley *v.* Learoyd, 33 C. D. 347, p. 355), while accepting the rule of the "ordinarily prudent man of business," expressed the opinion that, in applying it, care must be taken not to lose sight of the fact that the business of the trustee, unlike that which the ordinarily prudent man is supposed to be conducting for himself, is that of investing money for the benefit of persons who are to enjoy it at some future time, and not for the benefit of the person entitled to the present income.

The duty of a trustee is, not to take such care only as a prudent man would take if he had only himself to consider: it is rather to take such care "*as an ordinarily prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to*

provide"—a standard far different from that popularly supposed to be the guide for trustees.

The difficulties of a trustee's position are very great, since on the one hand he is exposed to the importunities of beneficiaries desirous of increasing their income, even at the risk of insecure investment of the capital, and on the other hand are the Courts, enforcing with extreme rigour the law relating to the liability of trustees. The natural result has been that it is extremely difficult to induce responsible persons to undertake the burdensome and thankless office of trustee. In fact, the creation of a Public Trustee, to take over the management of trusts, would be a legislative achievement of lasting value.

The Act of 1888 (re-enacted in this Act except as to Sections 1 and 8, which are left unrepealed) effected a beneficial revolution in the law relating to the liability of trustees; and now a trustee who may have invested in agricultural or house property, after having obtained the report of an able practical surveyor, and which subsequently depreciates, or a trustee who advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, is in the former case not liable at all, and in the latter is liable to make good only the sum advanced in excess of the proper sum.

Part II., in Clauses 10, 11, and 12, re-enacts the useful provisions of The Conveyancing Act, 1881, which deal with the appointment of new trustees and introduced the simple and effective method of transferring certain kinds of trust property from the old to new trustees, known as the Vesting Declaration.

Sections 13, 14, 15, and 16 are also a re-enactment of parts of The Trustee Act, 1888, which effected some useful

alterations in the law relating to sales by trustees, relaxing the rule laid down so strictly in Dance *v.* Goldingham (8 Ch. App. 909) and Dunn *v.* Flood (28 C. D. 591), while Section 17 is a re-enactment of Section 2 of The Trustee Act, 1888, which removed the difficulty created by the cases of *re* Bellamy and the Metropolitan Board of Works (24 C. D. 387) and *re* Flower and the Metropolitan Board of Works (27 C. D. 592).

Section 22 is a re-enactment of Section 38 of The Conveyancing Act, 1881, so far as that Section, which is repealed by the present Act, relates to trustees; but it must be borne in mind that the re-enacting Section only extends to trustees, whilst the repealed Section applied as well to powers given to executors or administrators as to powers vested in trustees.

Part III. of the Act deals with the Appointment of New Trustees and Vesting Orders. This portion is a very useful and valuable consolidation of the various Statutes dealing with the circumstances under which the Court can appoint new trustees, and the powers of the Court in actions relating to trust property generally; and Section 42 deals with the important question of payment into Court of trust moneys. The Act consolidates a number of enactments on this matter, and the practice will no doubt be much simplified.

The remaining Sections of the Act need not be adverted to, except to remark that the Definition Section seems to be at once clear and concise, and will compare very favourably with the long and intricate Definition Sections in the repealed Acts.

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January, 1894.

THE TRUSTEE ACT, 1893.

(56 & 57 VICT., CHAPTER 53.)

TABLE SHOWING THE ENACTMENTS REPEALED AND THE CORRESPONDING SECTIONS OF THE TRUSTEE ACT, 1893.

[Where a whole Act is repealed, or all the Sections of an Act remaining unrepealed, the words "the whole Act" are inserted in the first column of this Table. For the titles of these Acts see Schedule to The Trustee Act, 1893.]

Enactments Repealed.	Subject Matter.	Corresponding Sections of this Act, and Remarks.
36 Geo. 3, c. 52, s. 32. (E.)	Payment into court.	Section 42.
9 & 10 Vict. c. 101, s. 37. (E.*)	Power to invest subject to drainage, rent-charge.	Section 6.
10 & 11 Vict. c. 32, s. 53. (I.)	Ditto.	Section 6.
10 & 11 Vict. c. 96, s. 1, s. 2. (E.) [The whole Act.]	Payment into court.	Section 42.
s. 3 s. 4 s. 5 s. 6	———	Already repealed. See Revised Statutes.
11 & 12 Vict. c. 68 (I.) [The whole Act.]	Extending Trustee Relief Act to Ireland.	Sections 42 and 49.

* Repealed as to Ireland by 10 & 11 Vict. c. 32, s. 1.

Enactments Repealed.	Subject Matter.	Corresponding Sections of this Act, and Remarks.
12 & 13 Vict. c. 74, s. 1 (E.)	Payment into court.	Sections 42 and 49.
[The whole Act] s. 2	Act may be amended, &c.	Spent and repealed. Stat. Law Rev. 1875.
13 & 14 Vict. c. 60, s. 1	Repealing clause.	Spent and repealed. Stat. Law Rev. 1875.
s. 2	Definitions.	Section 50.
s. 3, s. 4, s. 5, s. 6	Vesting orders in lunacy.	These Sections relate wholly to lunacy, and, being repealed, except as to Ireland, by the Lunacy Act, 1890, are not affected by the repealing clause of the present Act.
s. 7, s. 8	Vesting orders in case of infant trustee or mortgagee of land or contingent right in land.	Sections 26, 28, 32.
s. 9, s. 10, s. 11, s. 12, s. 13, s. 14, s. 15	Orders as to estate or contingent right of trustee or heir of trustee.	Sections 26 and 32.
s. 16	Order as to contingent rights of unborn persons.	Section 27.
s. 17, s. 18	———	Repealed by 15 & 16 Vict. c. 55, s. 2.
s. 19	Vesting order in place of conveyance by heir or devisee of mortgagee.	Sections 29 and 32.
s. 20	Power to appoint a person to convey or transfer.	Sections 33 and 35 (2).

Enactments Repealed.	Subject Matter.	Corresponding Sections of this Act, and Remarks.
13 & 14 Vict. c. 60, s. 21	Jurisdiction in case of lands in Lancaster or Durham.	Extended by 17 & 18 Vict. c. 82, s. 11, and 52 & 53 Vict. c. 47, s. 8. Included in Section 46.
s. 22 s. 23 s. 24 s. 25	Vesting orders as to stock, &c.	Section 35 (1).
s. 26	Effect of order to transfer stock.	This as modified by 15 & 16 Vict., c. 55, s. 6, is dealt with by Section 35 (3) & (4).
s. 27	Effect of order vesting legal right to sue for a chose in action.	Omitted as unnecessary.
s. 28	Effect of an order vesting copyhold lands.	Section 34.
s. 29	Order where a decree is made for sale of real estate for payment of debts.	Section 30.
s. 30	Power of court to declare parties to suit to be trustees.	Section 31.
s. 31	Power to give directions as to exercise of right to stock, &c.	Section 35 (5).
s. 32	Power of court to appoint new trustees.	Section 25 (1).
s. 33	New trustees to have same powers as if appointed by decree in a suit.	
s. 34	Power to court to vest lands in new trustee	Sections 26 and 32.
s. 35	Power to court to vest right to call for transfer &c. in trustee.	Section 35 (1).
s. 36	Old trustees not to be discharged from liability.	Section 25 (2).

Enactments Repealed.	Subject Matter.	Corresponding Sections of this Act, and Remarks.
13 & 14 Vict. c. 60, s. 37	Persons entitled to apply for vesting orders.	Section 36.
s. 38	———	Repealed. Stat. Law Rev. 1875.
s. 39	———	
s. 40	Powers to present petition, and as to evidence	This is procedure, and as to evidence by affidavit is provided for by Order 38, R. 1.
s. 41	What may be done upon petition.	This is likewise procedure, and is already provided for by Rules of Court: Order 33, Rule 2, and Order 52, Rule 7.
s. 42	Courts may dismiss petition with or without costs.	Likewise procedure.
s. 43	Court may make an order in a cause.	Likewise procedure.
s. 44	Order to be conclusive evidence of facts on which they are founded	Section 40.
s. 45	Vesting orders as to charitable trusts.	Section 39.
s. 46	No escheat of trust estate, but only of beneficial interest.	Section 48.
s. 47		
s. 48	Money of infants and persons of unsound mind charged upon property may be paid into court by person by whom money is payable.	Dealt with in general terms by Section 42.
s. 49	Court may make decree in absence of a trustee.	Section 43.
s. 50	———	Repealed. Stat. Law Rev. 1875.
s. 51	Power to charge costs of order on trust estate.	Section 38.
s. 52	Commission concerning lunatic.	Refers to lunacy only, and is subject to the same remarks as Sections 3 to 6, *supra*.

Enactments Repealed.	Subject Matter.	Corresponding Sections of this Act, and Remarks.
13 & 14 Vict. c. 60, s. 53	Court may postpone order until right established in a suit.	Procedure.
s. 54	Application of vesting orders to land out of England.	Sections 41 and 52.
s. 55	Powers of Court of Chancery in Ireland.	Omitted as unnecessary, having regard to s. 13 of the Interpretation Act, 1889, which declares that the expression High Court, when used with reference to Ireland, shall mean the High Court in Ireland.
s. 56	Extent of powers of Lord Chancellor in lunacy.	Refers to lunacy only, and is subject to the same remarks as Sections 3 to 6, *supra*.
s. 57	Lunacy jurisdiction in Ireland.	Refers to the exercise of lunacy jurisdiction in Ireland, and is therefore saved by the exception to the repealing section contained in this Act.
s. 58	Short title.	
s. 59 s. 60	———	Repealed. Stat. Law Rev. 1875.
15 & 16 Vict. c. 55, s. 1	Vesting order consequential on decree in suit.	Sections 30 and 32.
s. 2	Vesting order in case of refusal by trustee to convey.	Included in Sections 26 and 32.
s. 3 s. 4 s. 5	Vesting orders as to stock, &c.	Section 35 (1).
s. 6	Effect of vesting order.	Section 35 (3) and (4) and Section 50, "Transfer."

Enactments Repealed.	Subject Matter.	Corresponding Sections of this Act, and Remarks.
15 & 16 Vict. c. 55, s. 7	Indemnity.	Section 49.
s. 8	Power to court to appoint new trustee in place of a convict.	Included in Sections 25 (1) and 32.
s. 9	Power to court to appoint new trustee where there is no existing trustee.	
s. 10	Orders and jurisdiction in lunacy.	Refer to lunacy only. See remarks on Sections 3 to 6 of 13 & 14 Vict. c. 60.
s. 11		
s. 12	Act to be construed as part of Trustee Act, 1850.	
s. 13	Stamp duty.	Superseded by 54 & 55 Vict. c. 39, s. 62.
17 & 18 Vict. c. 82, s. 11	Extension of powers to County Palatine of Lancaster.	Included in Section 46
18 & 19 Vict. c. 91, s. 10	Shares in ships to be treated as if they were stock for the purpose of a vesting order.	Section 35 (6). The Lunacy Act, 1890, s. 341, definition of "Stock," preserves the effect of the section as to vesting orders in lunacy made by the Court in England.
20 & 21 Vict. c. 60, s. 322. (I.)	Ireland. Power of court to appoint new trustee in place of bankrupt or insolvent.	Section 25 (1).
22 & 23 Vict. c. 35, s. 26	Trustees exonerated in respect of certain acts and payments.	Section 23.
s. 30	Trustees may apply to court for advice.	Unnecessary. Superseded by the recent practice as to originating summons. (Order 55, Rule 3 *et seq.*)

Enactments Repealed.	Subject Matter.	Corresponding Sections of this Act, and Remarks.
22 & 23 Vict. c. 35, s. 31	Implied indemnity of trustees.	Section 24.
23 & 24 Vict. c. 38, s. 9	Form of applying for advice of judge.	Unnecessary.
25 & 26 Vict. c. 108, s. 1 (E.) [The whole Act.]	Confirming certain sales	Merely confirms past transactions. Operation saved by Interpretation Act, 1889.
s. 2	Trustees with sanction of the court may dispose of land and minerals separately.	Section 44.
26 & 27 Vict. c. 73, s. 4	Trustees, unless authorised, not to apply for India stock certificate to bearer.	Section 7.
27 & 28 Vict. c. 114, s. 60	Power to invest in land improvement charges.	Section 5 (1) (b). The section applies not only to trustees, but to directors and other persons. It is therefore repealed only as to trustees.
s. 61	Power to invest subject to land improvement charges.	Section 6.
28 & 29 Vict. c. 78, s. 40	Power to invest on mortgages under Mortgage Debenture Act.	Section 5 (5).
31 & 32 Vict. c. 40, s. 7	Extending power of 30th section of Trustee Act to partition suits.	Section 31.
33 & 34 Vict. c. 71, s. 29	Trustees, unless authorised, not to apply for stock certificate to bearer.	Section 7.

Enactments Repealed.	Subject Matter.	Corresponding Sections of this Act, and Remarks.
34 & 35 Vict. c. 27, s. 1 [The whole Act.] s. 2	Power to invest in debenture stock.	Section 5 (2).
s. 3	Short title.	———
37 & 38 Vict. c. 78, s. 3	Trustees, vendors, or purchasers may sell under conditions of V. & P. Act, 1874.	Section 15.
s. 6	Married woman as bare trustee may convey.	Section 16.
38 & 39 Vict. c. 83, s. 21	Trustees, unless authorised, not to apply for certificates to bearer under Local Loans Act.	Section 7.
s. 27	Power to invest in debentures under Local Loans Act.	Section 5 (3).
40 & 41 Vict. c. 59, s. 12	Trustees, unless authorised, not to apply for colonial stock certificates to bearer.	Section 7.
43 & 44 Vict. c. 8, s. 7	Power to invest in Isle of Man Government securities.	Section 5 (4). The section applies to "trustees or other persons in the Isle of Man." It is therefore repealed only as to trustees.
44 & 45 Vict. c. 41, s. 31	Power of appointing new trustees.	Section 10.
s. 32	Retirement of trustee.	Section 11.
s. 33	Powers of trustee appointed by court.	Section 37.
s. 34	Vesting of trust property.	Section 12.
s. 35	How power of sale may be exercised.	Section 13.
s. 36	Trustees' receipts.	Section 20.
s. 37	Power of executors and trustees to compound, &c.	Section 21.

Enactments Repealed.	Subject Matter.	Corresponding Sections of this Act, and Remarks.
44 & 45 Vict. c. 41, s. 38	Power exerciseable by survivors of executors or trustees.	Section 22.
45 & 46 Vict. c. 39, s. 5	Appointment of separate sets of trustees.	Section 10.
46 & 47 Vict. c. 52, s. 147. (E.)	Court may appoint new trustee in place of trustee who is bankrupt.	Section 25 (1).
51 & 52 Vict. c. 59, s. 1	Short title, extent, and definition.	———
s. 2	Receipt by banker or solicitor as agent.	Section 17 (1) to (4).
s. 3	Depreciatory conditions of sale.	Section 14.
s. 4	Trustees, acting reasonably, excused for making certain investments.	Section 8.
s. 5	Liability confined to balance over what would have been a proper investment.	Section 9.
s. 6	Indemnity against beneficiary.	Section 45.
s. 7	Trustees may insure buildings.	Section 18 (1) and (2).
s. 8	Limitations as to trust property.	Not repealed.
s. 9	Investment on mortgage of long terms.	Section 5 (1) (*a*).
s. 10 s. 11	Trustees of renewable leasehold may renew and raise money for the purpose.	Section 19 (1) & (2)
s. 12	To what trusts Act is applicable.	Sections 4, 17 (5), 18 (3), 19 (3).
52 & 53 Vict. c. 32, s. 1	Short title.	———
s. 2	Extent of Act.	Section 52.

Enactments Repealed.	Subject Matter.	Corresponding Sections of this Act, and Remarks.
52 & 53 Vict. c. 32, s. 3	Authorised investments	Section 1.
s. 4	Purchase at a premium if redeemable by court.	Section 2.
s. 5	Discretion of trustee.	Section 3.
s. 6	To what trusts preceding sections are applicable.	Section 4.
s. 7	Investment of sinking fund by local authorities.	Not repealed.
s. 8	———	Spent.
s. 9	Interpretation.	Section 50.
52 & 53 Vict. c. 47, s. 8	Application of Trustee Acts to Palatine County of Durham.	Section 46.
53 & 54 Vict. c. 5, s. 140	Order founded on allegation of personal incapacity to be conclusive evidence of fact alleged.	Section 40.
53 & 54 Vict. c. 69, s. 17	Application of Trustee Acts to trustees for the purposes of the Settled Land Acts, 1882 to 1890.	Section 47.
55 & 56 Vict. c. 13, s. 6	Appointment of new trustees.	Section 10.

ARRANGEMENT OF SECTIONS

OF

THE TRUSTEE ACT, 1893.

(56 & 57 VICT., CHAPTER 35.)

PART I.

INVESTMENTS.

Section

1. Authorised investments.
2. Purchase at a premium of redeemable stocks.
3. Discretion of trustees.
4. Application of preceding Sections.
5. Enlargement of express powers of investment.
6. Power to invest notwithstanding drainage charges.
7. Trustees not to convert inscribed stock into certificates to bearer.
8. Loans and investments by trustees not chargeable as breaches of trust.
9. Liability for loss by reason of improper investments.

PART II.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

Appointment of New Trustees.

10. Power of appointing new trustees.
11. Retirement of trustee.
12. Vesting of trust property in new or continuing trustees.

Purchase and Sale.

13. Power of trustee for sale to sell by auction, &c.
14. Power to sell subject to depreciatory conditions.
15. Power to sell under 37 & 38 Vict. c. 78.
16. Married woman as bare trustee may convey.

Various Powers and Liabilities.

17. Power to authorise receipt of money by banker or solicitor.
18. Power to insure building.
19. Power of trustees of renewable leaseholds to renew and raise money for the purpose.
20. Power of trustee to give receipts.
21. Power for executors and trustees to compound, &c.
22. Powers of two or more trustees.
23. Exoneration of trustees in respect of certain powers of attorney.
24. Implied indemnity of trustees.

PART III.

POWERS OF THE COURT.

Appointment of New Trustees and Vesting Orders.

Section
25. Power of the Court to appoint new trustees.
26. Vesting orders as to land.
27. Orders as to contingent rights of unborn persons.
28. Vesting order in place of conveyance by infant mortgagee.
29. Vesting order in place of conveyance by heir, or devisee of heir, &c., or personal representative of mortgagee.
30. Vesting order consequential on judgment for sale or mortgage of land.
31. Vesting order consequential on judgment for specific performance, &c.
32. Effect of vesting order.
33. Power to appoint person to convey.
34. Effect of vesting order as to copyhold.
35. Vesting orders as to stock and choses in action.
36. Persons entitled to apply for orders.
37. Powers of new trustee appointed by Court.
38. Power to charge costs on trust estate.
39. Trustees of charities.
40. Orders made upon certain allegations to be conclusive evidence.
41. Application of vesting order to land out of England.

Payment into Court by Trustees.

42. Payment into Court by trustees.

Miscellaneous.

43. Power to give judgment in absence of a trustee.
44. Power to sanction sale of land or minerals separately.
45. Power to make beneficiary indemnify for breach of trust.
46. Jurisdiction of palatine and county courts.

PART IV.

MISCELLANEOUS AND SUPPLEMENTAL.

47. Application to trustees under Settled Land Acts of provisions as to appointment of trustees.
48. Trust estates not affected by trustee becoming a convict.
49. Indemnity.
50. Definitions.
51. Repeal.
52. Extent of Act.
53. Short title.
54. Commencement.
SCHEDULE.

THE TRUSTEE ACT, 1888.

(51 & 52 VICT., CHAPTER 59.)

An Act to Amend the Law relating to the Duties, Powers, and Liability of Trustees. [24th December, 1888.

The only Sections of The Trustee Act, 1888 (51 & 52 Vict. c. 59), left unrepealed by The Trustee Act, 1893 (*see* Section 51), are Sections 1 and 8, given below. Of The Trust Investment Act, 1889 (52 & 53 Vict. c. 32), only Sections 1 and 7 are left unrepealed (*see* pp. 25 and 26), and these are dealt with in the notes to Section 1 of The Trustee Act, 1893 (*infra*, p. 30 *et seq.*).

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows; that is to say,

Short title, extent, and definition.

1. (1) This Act may be cited as The Trustee Act, 1888.

(2) This Act shall not extend to Scotland.

(3) For the purposes of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds.

(4) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

The expression "Trustee" has for the purposes of the Act four meanings assigned to it: viz.—

(*a*) An express trustee.
(*b*) An executor.
(*c*) An administrator.
(*d*) A constructive or implied trustee.

All these persons will accordingly have the powers, and be entitled to the protection, afforded by the Act, executors and administrators being placed on the same footing as trustees for the purposes of this Act.

What may be the exact meaning of "*a trustee whose trust arises by construction or implication of law*" will probably require judicial interpretation. A well-known text-writer, Lewin, "On the Law of Trusts," 9th ed., p. 118, note (1), says, "The terms 'Implied Trusts by Operation of Law' and 'Constructive Trusts' appear from the books to be almost synonymous expressions"; and the learned writer defines an Implied Trust as "*one declared by a party not directly, but only by implication*"; while Trusts by Operation of Law "are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity"; and he divides them into (1) Resulting Trusts, as where an estate is devised to A and his heirs upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; and (2) Constructive Trusts, which are trusts the Court elicits by a construction put upon certain acts of parties, as when a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease. It seems clear, therefore, that if this division is adopted by the Courts, the Act will apply, amongst other cases, to the following constructive trusts: namely—Where a person holds property on a precatory trust; Where a person agrees for valuable consideration to settle or sell a specified estate; Where property, whether real (Dyer *v.* Dyer, White & Tudor's L. C. 203) or personal (Elrand *v.* Dyer, 2 Ch. Ca. 36), has been conveyed to others than, or jointly with, the person who has paid the purchase-money. The actual operation of the Act in some of these cases will, however, be small.

"Trustee," by virtue of Sub-section 4, throughout the Act, applies not only to a sole trustee, but also to two or more acting jointly in a trust, and the powers thereby conferred will have naturally to be exercised by them jointly.

"Official Trustee of charitable funds."—As to the Official Trustee see 18 & 19 Vict. c. 124, Sections 15 and 18, and 50 & 51 Vict. c. 49. Section 4.

Statute of limitations may be pleaded by trustees.

8. (1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until

the interest of such beneficiary shall be an interest in possession.

(2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3) This section shall apply only to actions or other proceedings commenced after the First day of January One thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

This Section effected a most important and much-needed alteration in the law. Previous to the passing of this Act (apart from The Bankruptcy Act, 1883, referred to hereafter) the state of the law as to how far the Statutes of Limitations applied to actions for breach of trust seems to have been as follows:—

1. *As to Express Trusts.*—It is clear that they were not within the Statutes of Limitations. In Petre *v.* Petre (1 Drew, 393) the Vice-Chancellor of England said: "A person who is, under some instrument, an express trustee, or who derives title under such trustee, is precluded, how long soever he may have been in enjoyment of the property, from setting up the Statute." In Obee *v.* Bishop (1 De G. F. & J. 137) L. J. Turner said: "I am of opinion that it would be most dangerous to hold that a demand against the assets of a deceased trustee, or personal representative, in respect of a breach of trust or misappropriation committed by him, is barred at the expiration of six years from his death." This has been followed in many subsequent cases, and the Statutes have been held not to apply, even after very long periods of time have elapsed. (*See* Woodhouse *v.* Woodhouse, 8 L. R. Eq. 514; Butler *v.* Carter, 5 L. R. Eq. 276; and Edwards *v.* Warden, 1 App. Ca. 281.) Any doubt on this point would be set at rest by Section 25, Sub-section 2, of The Judicature Act, 1873 (36 & 37 Vict. c. 66), which enacts that "No claim of a *cestuique trust* against his trustee for

any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitation."

This may at first sight appear to be inconsistent with Section 10 of The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which enacts that "After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust." But this is explained by the fact that the latter section quoted applies as between land charged and the persons entitled to a charge, while the former applies to claims as between *cestuique trust* and trustee (*see* Fearnside *v.* Flint, 22 C. D. 579; Hughes *v.* Coles, 27 C. D. 231).

But even in cases of express trust, where there has been gross laches in bringing the action, and there is evidence of acquiescence on the part of the plaintiff, the Court will not, after the lapse of a long period (in the case in question, about twenty years), interfere on the plaintiff's behalf (Bright *v.* Legerton, 2 De G. F. & J. 606).

2. *As to Implied or Constructive Trusts.*—It seems that in cases where there has been laches on the part of the plaintiff in bringing the action, or acquiescence, the Court will not readily interfere, though no strict rule has been laid down as to the exact length of time required to justify the Court in refusing its assistance (*see* Kirkman *v.* Booth, 11 Beav. 273; Sleeman *v.* Wilson, 13 L. R. Eq. 36: in both of which cases a period of about forty years had elapsed before action brought).

In Townshend *v.* Townshend (1 Bro. C. C. 550) Lord Commissioner Ashurst says: "Then as to trusts being an exception to the Statute of Limitations, the rule holds only as between trustees and *cestuique trusts*. It is true that a trustee cannot set it up against his *cestuique trust*, but this is merely the case (referring to the case he was hearing) of *a trustee by implication*, and as such affected by an equity; but that equity must be pursued within some reasonable time. Both Courts of Law and Equity preserve an analogy to the Statute of Limitations." And again, in Beckford and others *v.* Wade (17 Ves. 87) the M. R. said: "It is certainly true that no time bars a direct trust as between *cestuique trust* and trustee; but if it is meant to be asserted that a Court of Equity allows a man to make out a case of constructive trust

at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be: so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who after long acquiescence comes into a Court of Equity to seek that relief."

The Statute would (by analogy) begin to run in these cases of constructive trust from the date of the discovery of the circumstances which constitute the right to relief.

Reference has been made above to The Bankruptcy Act, 1883, which, by permitting (Section 37, Sub-sections 1 and 3) liabilities for breaches of trust to be provable in bankruptcy, and by enacting (Section 30, Sub-section 2) that an order of discharge shall release the bankrupt from debts provable in bankruptcy other than (*inter alia*) debts or liabilities incurred by means of a fraudulent breach of trust, opened a method of escape, though not an inviting one, to trustees seeking to be relieved from long-standing liabilities arising from ordinary breaches of trust untainted by fraud.

Section 25, Sub-section 2, of The Judicature Act, 1873, cited above, is in effect repealed by the Section of this Act now under discussion (Section 8), so far as regards innocent breaches of trust untainted by fraud; but not in cases where the claim is to recover trust property still retained or previously received by the trustee and converted to his use.

Sub-section 1 (*a*).—Since the passing of this Act several decisions have been given which throw some light on this Sub-section.

The Section is intended to give trustees the benefit of the Statutes of Limitation, and it now seems clear from the decisions that the particular Statute of Limitation whose protection will be chiefly invoked is 21 Jac. I. c. 16, which limits the period for bringing actions of debt to six years from the cause of action.

Certain cases are expressly excepted from the operation of the Section [*see* Section 8 (1)]:—

i. Where the claim is founded on any fraud.

ii. Where the claim is founded on fraudulent breach of trust to which the trustee was party or privy.

iii. Where the claim is to recover trust property, or the proceeds thereof, still retained by the trustee.

iv. Where the claim is to recover trust property, or the proceeds thereof, previously received by the trustee and converted to his use (*see re* Gurney, Mason *v.* Mercer, 1893, 1 Ch. 590).

To these may be added the modification created by the last clause of Sub-section 1 (*b*) : namely—

v. The Statute shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

In re Bowden, Andrew *v.* Cooper (45 C. D. 444), which was an action against the executor of a deceased trustee in respect of investments negligently made, it was established that in cases of mere negligence Section 8 applied—Sub-section 1 (*b*) being the particular part which operated—and that none of the exceptions excluded the case from that operation.

Shortly, the case was as follows :—A newly appointed trustee of a will brought an action against an old trustee and the representatives of two deceased trustees to compel them to make good losses arising from investments negligently made on insufficient security more than six years before the action. It was held that Section 8, Sub-section 1 (*b*), applied. In this case a curious point was raised with reference to Section 8, Sub-section 1 (*a*), of the Act. It was said that that Sub-section could not apply, for the action was one which could not be brought against anyone not a trustee; and Fry, J., in reference to this argument, said: "That was the Sub-section relied on by the defendant; but I do not think that it can apply in this case. In the first place, it is obvious that if a person had not been a trustee, he could not be sued for a breach of trust, and, further, that there is no right or privilege, that I am aware of, conferred by any Statute of Limitations in respect of a breach of trust." If this view is correct, Sub-section 1 (*a*) might as well have been left out of the Act.

Probably it was put in *ex majore cautelâ*, but it was certainly not intended to be merely nugatory. This comment of Fry, J., is, it is submitted, a refinement in construing the Statute which might tend to destroy a useful legislative enactment. The Sub-section in question evidently means that, assuming an action is brought against a trustee in that capacity, then he is to have the same protection from the Statutes of Limitations (except in the cases excluded) as if he had not been a trustee. Thus in an action for breach of trust by negligent investment (or, to put it shortly, an action for negligence) he

can plead the Statute relating to limitation of actions for negligence, as any other subject of the Queen might have who is not a trustee.

If, however, the view of Fry, J., is correct, it seems clear that this particular Sub-section does not apply to an action against a trustee for breach of trust.

In re Page, Jones *v.* Morgan (1893, 1 Ch. 304), a trustee was sued for breach of trust, by having expended the whole of a sum payable to the plaintiff on attaining majority in educating and maintaining him during minority. Twelve years after coming of age the action was brought. The plaintiff did not allege that the defendant had been party or privy to any fraud or fraudulent breach of trust, and there was no evidence that he had converted any part of the fund to his own use, or that he had retained any part of it, but he admitted he had never rendered any account to the plaintiff. Justice North held that Section 8 of the Trustee Act applied, and dismissed the summons, but without costs.

Sub-section 1 (*b*).—By enacting that where no existing Statute of Limitation applies "the trustee, or person claiming through him, shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received," the Act seems to mean, according to the cases which have been decided, that in all cases in future where a breach of trust has been committed without the elements of fraud or conversion of trust property, six years shall be the period after which the remedy is barred, and this is strictly in accordance with the words of the Section, which make lapse of time a bar as if the claim had been made against the trustee "*in an action of debt for money had and received.*"

The true construction of this Sub-section is to put all breaches of trust, whether creating a simple contract liability or one of the nature of a debt due by specialty, on the same footing, and to make the period of six years apply to both kinds of liability to such actions. In the words of the Section, "No existing Statute of Limitation applies," and they would *primâ facie* appear to come within this Sub-section.

As has been observed, pending a decision on Sub-section 1 (*a*), Sub-section 1 (*b*) is the effective enactment in this Section. With reference to its operation, the case of Thorne *v.* Knight (1891, 1 Ch. 547) shows that the principle established by the case of Blair *v.* Bromley (2 Ph. 354; 5 Hare, 542) is not affected in any way by the Section

in question. Stirling, J., in Moore *v.* Knight (*ubi supra*, p. 555), says: "It appears, therefore, that the money came into the hands of the firm of Messrs. Bromley without fraud, and that one of the firm afterwards committed a fraud in respect of it, but made misrepresentations (some of which were attributable to the firm) which prevented the fraud from being discovered until the period fixed by the Statute of Limitation had expired. It was held that the innocent partner was deprived of the benefit of the Statute by those representations, which bound him as a partner. The decision rests on principles of the law relating to representation and to partnership, not on those which relate to trusts; and in my opinion those principles are unaffected by the provisions of The Trustee Act, 1888."

In re Swain, Swain *v.* Bridgman (1891, 3 Ch. 233), was another case on Sub-section 1 (*b*). In that case, instead of realising the testator's residuary personal estate, the trustees, at the instance of the widow, in breach of trust allowed her and her children to live at the farm which the testator had occupied, and the trustees and the survivors of them carried on the farm, by the profits of which the widow and children were maintained, and the children were educated. The action was to render the surviving trustee liable to make good to the testator's estate an alleged loss of £1,822 3s. 3d. by the delay in realising his residuary personal estate, and by employing his assets in the farming business. It was held that Section 8 applied.

Reference may also be made to the cases cited above—*in re* Bowden, Andrew *v.* Cooper (45 C. D. 451), and *in re* Page, Jones *v.* Morgan (1893, 1 Ch. 304).

Time is by this Act, in cases coming within Section 8, Sub-section (*b*) (*i.e.*, where the statutory period which bars an action for debt for money had and received is applicable), to run even against a married woman, whether restrained from anticipation or not, provided she is entitled in possession. This is a deviation from 21 Jac. I. c. 16, Section 7, which treats coverture as a disability.

Time is only to begin to run when the beneficiary's interest is one in possession.

Sub-section 2 in effect allows the Statute to be pleaded as against one or more beneficiaries, though the trustees may remain liable to another or other beneficiaries for recouping tc them their own share of the trust fund.

Sub-section 3.—This Section 8 is only applicable to actions or other proceedings commenced after the 1st of January, 1890, though the

trust may itself have been created before that date, and preserves all existing defences under any Statute of Limitations.

In re Harrison, Allen *v.* Cort (W. N. 1892, p. 148), it was decided that this Section had no application as against persons who had been served with a decree for general administration pronounced after the 1st of January, 1890, in an action which had been commenced before that date.

It may be useful to give here the provisions of certain other Acts relating to the limitation of proceedings dealing with trusts, and which provisions, being untouched and unrepealed by this Act or by The Trustee Act, 1893, have considerable bearing on the Section of the Act of 1888 now under discussion.

By 3 & 4 Will. IV. c. 27, Section 25, it is enacted: "Where any land or rent within the meaning of any Statute of Limitations is vested in a trustee on any express trust, the right of the beneficiary or any person claiming through him to bring an action against the trustee, or any person claiming through him, to recover the land or rent, shall be deemed to have first accrued, according to the meaning of any Statute of Limitations, at and not before the time at which the land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against that purchaser and any person claiming through him."

By 36 & 37 Vict. c. 68, Section 25 (2), and 40 & 41 Vict. c 28 (2), it is enacted that "No claim of a beneficiary against his trustee in respect of any property held on an express trust or in respect of any breach of an express trust shall be barred by any Statute of Limitations." This has been commented on above.

37 & 38 Vict. c. 57, Section 10, enacts that "No action or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trusts."

With regard to 3 and 4 Will. IV. c. 27, Section 25, it is to be observed that the Section applies to any "*land*" or "*rent*" vested on "*any express trust*," and runs only in favour of a purchaser for valuable consideration, or any person claiming under him. The Section is not for the protection of a trustee who may have been in possession of

the property, but of a purchaser from him. As from that purchaser the property can only be recovered within such period as the law may lay down, calculating from the period of accruer of the right to bring the action. The Section, in addition to enacting who may benefit by the limitation of time, defines when the right to bring the action which is to be barred shall be deemed to have accrued.

It is clear from the cases decided on this Section that "express trust" means one expressly declared by some deed, will, or other document, and does not include what are known as constructive trusts (Petre *v.* Petre, 1 Drew, 393).

Constructive trusts cannot be set up after a great lapse of time, Courts of Equity by analogy applying the Statute of Limitations, and the trustee will be entitled to retain the property (Beckford *v.* Wade, 17 Ves. 97; *ex parte* Hassell, 3 Y. & Coll. 622; Bell *v.* Bell, 1 Lloyd & G. *temp.* Plunket, 65; Bonny *v.* Ridgard, 4 Bro. C. C. 138).

In Salter *v.* Cavanagh (1 Drury & Walsh, 668) a trust arose on the face of the instrument, and so was within this Section.

As to who are express trustees within the meaning of the Section the following cases may be consulted:—

A trustee *de son tort*, where there were express trusts (Life Association of Scotland *v.* Siddall, 3 De G. F. & J. 58), was held a trustee within this Section.

A trust for sale of land by way of security for money is not an express trust (Locking *v.* Parker, L. R. 8 Ch. 30).

So too an assignee in bankruptcy, who has taken a conveyance of the legal estate upon trust for creditors, is a trustee within the Section (Sturgis *v.* Morse, 3 De G. & J. 1).

In Dickinson *v.* Teasdale (1 De G. J. & S. 59) the class of trust to which this Section refers is clearly pointed out.

Although the trust must be an express one, the actual word need not be used (Commissioners of Charitable Donations *v.* Wybanks, 2 Jon. & Lat. 197). But so long as the words used naturally give rise to a trust, that is an "express trust" within the Section.

The most useful case on this point is Patrick *v.* Simpson (24 Q. B. D. 128), following exactly Salter *v.* Cavanagh (1 D. & Wal. 668), and is distinguishable from Churcher *v.* Martin (42 Ch. D. 312) on the ground that the deed in that case, which conveyed the land to the trustees, was void under the Mortmain Act. In Mutlow v. Bigg (L. R. 18 Eq. 246), where there was a devise of land upon trust for sale, the proceeds to be considered as part of the personal estate, and the trustees

allowed part of the land to remain unsold for fifty years, it was held that the trust was an express one within the Section in the former Act, similar to this one, and a decree for the execution of the trust of the unsold land was made at the suit of a residuary legatee. This case was reversed upon further evidence in the Court above, but the point decided is not affected.

Putting the matter shortly, it will appear that what is an "express trust" is a question to be decided with reference to this particular Statute, and is not to be determined by reference to the general distinctions drawn in Courts of Equity between trusts, as express, implied, constructive, or otherwise.

With reference to the point whether time runs as against persons under disability, the result of the cases appears to be that time begins to run from the date of the estate falling into possession, or the disability coming to an end. (Thompson *v.* Simpson, 1 Dru. & War. 489; A. G. *v.* Magdalen College, 18 Beav. 239; Life Association of Scotland *v.* Siddall, 3 De G. F. & J. 58; Shaw *v.* Keighron, 3 Ir. R. Eq. 574; Butler *v.* Carter, 5 L. R. Eq. 276; Quinton *v.* Frith, 2 Ir. R. Eq. 396.)

Time, under Section 25 of 3 & 4 Will. IV. c. 27, actually begins to run as against a *cestuique* trust from the moment when a conveyance to a *bonâ fide* purchaser for value has taken place (Petre *v.* Petre, 1 Drew, 371).

With regard to Section 25, Sub-section 2, of 36 & 37 Vict. c. 66, as remarked, it appears to be in direct conflict with the provisions of Section 8 of The Trustee Act, 1888, which would no doubt prevail as a later enactment. Indeed, in none of the cases decided on that Act since it was passed has it been contended that Section 25 of 36 & 37 Vict. c. 66 still continues to govern cases.

As to Section 10 of 37 & 38 Vict. c. 57, set out above, it is clear a charge would not, in the absence of this Section, have been a trust within 36 & 37 Vict. c. 66, Section 25, Sub-section 2, as Section 40 of 3 & 4 Will. IV. c. 27 specially dealt with such charges, and under it twenty years was the period of limitation; but Section 10 of 37 & 38 Vict. c. 57 places charges, whether secured by a trust or not, on the same footing, and they are thus barred at the end of twelve years.

But cases may occur where, though in form a charge, there is really a trust, as in the case of Commissioners of Charitable Donations *v.* Wybrants (2 Jon. & Lat. 182) and Hunt *v.* Bateman (10 Ir. Eq. R. 360). These cases would now, it is apprehended, fall under Section 8 of The Trustee Act, 1888.

THE TRUST INVESTMENT ACT, 1889.

(52 & 53 VICT., CHAPTER 32.)

An Act to Amend the Law relating to the Investment of Trust Funds. **[12th August, 1889.**

The whole of The Trust Investment Act, 1889, with the exception of Sections 1 and 7, given below, is repealed by The Trustee Act, 1893 (see Section 51 and Schedule). With regard to these unrepealed Sections see the notes to Section 1 of The Trustee Act, 1893 (*infra*, p. 30 *et seq.*).

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as The Trust Investment Act, 1889.

Investment of sinking fund by local authorities.

7. Where the council of any county or borough or any urban or rural sanitary authority are authorised or required to invest any money for the purpose of a loans fund or a sinking fund, any enactment relating to such investment shall be modified so far as to allow such money to be invested in any of the stocks, funds, shares, or securities in which trustees are authorised by this

Act to invest, except that such council or authority shall not by virtue of this Section invest in any stocks, funds, shares, or securities, issued or created by themselves, nor in real or heritable securities.

Provided that it shall not be lawful for any such council or authority to retain any securities which are liable to be redeemed at a fixed time at par or at any other fixed rate, and are at a price exceeding their redemption value, unless more than fifteen years will elapse before the time fixed for redemption.

THE TRUSTEE ACT, 1893.

(56 & 57 VICT., CHAPTER 53.)

An Act to Consolidate Enactments relating to Trustees.

[22nd September, 1893.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

INVESTMENTS.

Authorised investments.

1. A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say:

(*a*) In any of the Parliamentary stocks or public funds or Government securities of the United Kingdom:

(*b*) On real or heritable securities in Great Britain or Ireland:

(*c*) In the stock of the Bank of England or the Bank of Ireland:

(*d*) In India Three and a half per cent. stock and India Three per cent. stock, or in any other capital stock which may at any time

hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India:

(*e*) In any securities the interest of which is for the time being guaranteed by Parliament:

(*f*) In consolidated stock created by the Metropolitan Board of Works or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District:

(*g*) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock:

(*h*) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in Sub-section (*g*), either alone or jointly with any other railway company:

(*i*) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(*j*) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub

and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D, and annuities comprised in the register of annuitants Class C, of the East Indian Railway Company:

(*k*) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

(*l*) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:

(*m*) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council, under

the authority of any Act of Parliament or Provisional Order:

(*n*) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied:

(*o*) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court,

and may also from time to time vary any such investment.

1. This Section substantially replaces Section 3 of The Trust Investment Act, 1889 (52 & 53 Vict. c. 32), the whole of which Act, with the exception of Sections 1 and 7, is repealed by the present Act (*see* Section 51 and the Schedule).

This Section applies as well to trusts created before as to trusts created after the passing of the Act, and the powers thereby conferred are an addition to the powers conferred by the instrument (if any) creating the trust (*see* Section 4).

The case of there being no instrument creating the trust is expressly contemplated by this Section, and it is conceived that the word "trustee" includes not only an express trustee, but also a person having in his hands moneys which by the rules of equity are impressed with a trust, and which by those rules he is bound to invest. (*See in*

re National Permanent Mutual Benefit Building Society, 43 Ch. Div. 431; *in re* Manchester Royal Infirmary, Manchester Royal Infirmary *v.* Attorney General, 1891, 1 Ch. 423; and the definition of the expression "trustee" in Section 50 of the present Act.)

"Trustee" applies not only to a sole trustee, but also to the case of several trustees.—*See* The Interpretation Act, 1889 (52 & 53 Vict. c. 63), Section 1, Sub-section 1 (*b*).

"Unless expressly forbidden by the instrument (if any) creating the trust."—The effect of these words is, where the trust was created before the passing of the Act, and the trust instrument expressly forbids investment in any particular security specified in this Section, or expressly forbids investment in other than certain named securities, to debar the trustees from investing, in the one case in the excluded security, and in the other in any securities other than those indicated in the trust instrument; and where the trust is created after the passing of the Act, to enable the creator of the trust to exclude the operation of this Section, and to preclude the trustees from investing the trust fund in securities other than those pointed out by the trust instrument.

"Instrument" includes Act of Parliament (*see* Section 50).

"Invest."—Where a testator has directed a fund to be set apart, and appropriated by the trustees of his will, for some particular purpose—as, for instance, to provide for an annuity—the power of investment given by this Act does not apparently authorise them at their discretion to invest in any of the investments mentioned in this Section; but the appropriation must be made by investing the necessary sum in the investments specifically pointed out by the will, or, if the will is silent as to the mode of investment, in New Consols, treating the interest at two and a half per cent (*in re* Owthwaite, Owthwaite *v.* Taylor, 1891, 3 Ch. 494).

"Trusts Funds."—The funds of a benefit building society invested in the name of the society, or in the names of trustees who have no power of investment independently of the Act, are not trust funds within this Section (*in re* National Permanent Mutual Benefit Building Society, 43 Ch. Div. 431).

But it is apprehended that where a fund is standing in the name of a trustee who has a power of investment over it, either by the terms of the trust instrument or by law, such a fund, even though held for charitable purposes, is a trust fund within this Section, and so far as there is no prohibition in the trust instrument the power conferred

by this Section is applicable (*in re* Manchester Royal Infirmary, Manchester Royal Infirmary *v.* Attorney General, *supra*).

"Whether at the time in a state of investment or not."—These words were not contained in The Trust Investment Act, 1889 (52 & 53 Vict. c. 32), and they are no doubt inserted in this Act for the purpose of obviating the question which was raised in the case of *in re* Dick, Lopes *v.* Hume-Dick (1891, 1 Ch. 423), affirmed in the House of Lords as Hume *v.* Lopes (1892, A. C. 112).

Sub-section (*a*).—"Parliamentary Stocks."—It was said by Vice-Chancellor Sir W. Page Wood that in order to come within the description "Government or Parliamentary stocks or funds," a fund ought to be either managed by Parliament, or paid out of the revenues of the British Government, or at least guaranteed by that Government (Brown *v.* Brown, 4 K. & J. 704, 706).

"Public Funds."—These words in strictness mean the funds provided by various Acts of Parliament for the payment of the annuities granted by the Government and forming part of the National Debt, and include only Government Annuities (Slingsby *v.* Grainger, 7 H. L. C. 273, 285).

"Government Securities."—This expression includes Bank Annuities (*ex parte* A Projected Undertaking &c., 11 Jur. 160), and it probably extends to Exchequer Bills, though the question is not free from doubt, since it has been decided differently in two cases (*see ex parte* Chaplin, 3 Y. & C. Exch. C. 397, and *ex parte* South Western Railway Company, 9 Jur. 650).

Sub-section (*b*).—This Sub-section does not enable trustees to invest in the purchase of real estate, but only on mortgage of it.

"Real or Heritable Securities."—Without reference to statutory enactment, a power to invest on real securities only authorises a mortgage of fee simple or copyhold lands in England or Wales.

By Section 9 of The Trustee Act, 1888 (51 & 52 Vict. c. 59), trustees having power to invest in real securities were authorised, and were to be deemed always to have had authority, to invest upon mortgage of leasehold property held for an unexpired term of not less than 200 years, and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition for re-entry, except for non-payment of rent. That Section, however, is repealed by the present Act for the purpose of consolidation, and re-enacted (*see infra*, Section 5).

Trustees advancing trust money on the security of copyholds ought

not to rely upon a mere covenant to surrender, but should see that a surrender is actually made (*see* Wyatt *v.* Sharratt, 3 Beav. 498).

As to how far trustees are justified in making advances on the security of undivided shares or of reversions see Lewin's "Law of Trusts," 9th edition, p. 363.

With regard to the making of advances on the security of undivided shares, it must be borne in mind that such a mode of investment involves a complication with the rights of others which may ultimately lead to litigation and a reduction in the value of the security.

In the absence of an express authority, it is a breach of trust for trustees, having the ordinary power to invest on "real securities," to invest on a contributory mortgage (*see* Webb *v.* James, 39 Ch. Div. 660).

Trustees are not justified in advancing trust money upon a second mortgage (Norris *v.* Wright, 14 Beav. 308, and Drosier *v.* Brereton, 15 Beav. 226), or upon a deposit of title deeds (Swaffield *v.* Nelson, W. N. 1876, p. 255); but they would probably be justified in making a loan upon the security of a sub-mortgage if they got the legal estate and stood in the shoes of the original mortgagee with regard to the powers contained in or arising under the original mortgage deed (*see* Smethurst *v.* Hastings, 30 Ch. Div. 490).

"Heritable."—This word seems to be introduced with reference to real property in Scotland. Heritable property in Scotland does not, however, in all respects correspond with what is known as real property in England: for instance, by Scotch law, leases, even for a fixed term, are heritable unless the destination expressly excludes heirs (*see* Paterson's "Compendium of English and Scotch Law," Section 715).

This Act is not to extend to Scotland; that is to say, it is not to affect Scotch trustees or the Scotch law of trusts (*see* Section 52). It is conceived, however, that English or Irish trustees would, since the Sub-section now under consideration extends to "real or heritable securities in Great Britain or Ireland," be justified in making advances upon the security of property in Scotland which was essentially of a real character; but it is very doubtful whether they should be advised to do so, having regard to the great difference in Scotland in the law of real property and the practice of conveyancing.

"Ireland."—Trustees having power to advance trust money on lands in Ireland might invest it upon mortgage of leaseholds perpetually renewable with a head-rent, because that is a common tenure of land in Ireland (*see* Macleod *v.* Annesley, 16 Beav. 600), or upon lands held

upon fee farm grants made under the provisions of 12 & 13 Vict. c. 105, and 31 & 32 Vict. c. 62, the effect of such grants being to convert the renewable leasehold tenure into a tenure in fee simple.

The law requires of a trustee investing the moneys of his trust upon mortgage security the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs (Learoyd *v.* Whiteley, 12 App. Ca. 727, 733, and Rae *v.* Meek, 14 App. Ca. 558, 569, 570).

Sub-section (*c*).—Bank stock, however, was not at one time considered as a proper security for investment of trust moneys (Trafford *v.* Boehm, 3 Atk. 440, 444).

The Bank of Ireland was established by Royal Charter in 1783, and holds in Ireland a position analogous to that of the Bank of England, the Government accounts being kept there.

Sub-sections (*g*) *and* (*h*).—As to railway companies of the United Kingdom which fall under these Sub-sections, see Burdett's "Official Intelligence," pp. 210 to 433.

Trustees must exercise caution when investing under Sub-section (*h*). The list given in the London Stock Exchange List of railways leased at fixed rentals is not altogether reliable, since some of the railways there mentioned have not been leased, but actually transferred to and vested in other railways. Prior to investment reference should be made to the lessor company or companies.

The expressions "leased in perpetuity" and "fixed rental" will probably need judicial interpretation.

Sub-section (*j*).—It will be observed that this Sub-section, authorising, as it does, investments in deferred annuities comprised in the register of holders of annuity Class D, and annuities comprised in the register of annuitants Class C, of the East India Railway Company, is more extensive than the Sub-section of The Trust Investment Act, 1889, which it replaces.

Sub-section (*k*).—This Sub-section is also somewhat wider in its terms than the Sub-section for which it is substituted.

Sub-section (*o*).—The investment of cash under the control of, or subject to the order of, the Court is now regulated by Rule 17 of Order XXII. of the Rules of the Supreme Court.

The following are the investments authorised:—

Two and Three-quarters per Cent. Consolidated Stock (to be called after the 5th April, 1903, Two-and-a-half per Cent. Consolidated Stock).

Consolidated Three Pounds per Cent. Annuities.
Reduced Three Pounds per Cent. Annuities.
Two Pounds Fifteen Shillings per Cent. Annuities.
Two Pounds Ten Shillings per Cent. Annuities.
Local Loans Stock under The National Debt and Local Loans Act, 1887.
Exchequer Bills.
Bank Stock.
India Three-and-a-half per Cent. Stock.
India Three per Cent. Stock.
Indian Guaranteed Railway Stocks or Shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment.
Stocks of Colonial Governments guaranteed by the Imperial Government.
Mortgage of freehold and copyhold estates respectively in England and Wales.
Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent.
Three per Cent. Metropolitan Consolidated Stock.
Debenture, Preference, Guaranteed, or Rentcharge Stocks of Railways in Great Britain or Ireland, having for ten years next before the date of investment paid a Dividend on Ordinary Stock or Shares.
Nominal Debentures or Nominal Debenture Stock under The Local Loans Act, 1875, provided that in each case such Debentures or Stock shall not be liable to be redeemed within a period of fifteen years from the date of investment.

It will be seen that the investments authorised by the Order of Court are almost all included amongst the investments directly authorised by this Act. The following differences, however, between the provisions of the Act and the directions contained in the Order of Court will be noticed: (1) The Act requires that in order to qualify the debenture, or rentcharge, or guaranteed or preference stock of a railway in Great Britain or Ireland as a fit investment for trust funds, the railway company should during each of the ten years last past before the date of investment have paid a dividend of not less than three per cent. per annum on its ordinary stock, but the Order of Court only requires a dividend to have been paid for ten years next

before the date of investment, and is silent as to amount. (2) The Order of Court extends to Indian Guaranteed Railway stocks or shares, provided that in each case such stock or shares shall not be liable to be redeemed within fifteen years from the date of investment, whilst Sub-section (*i*) of the Act only includes debenture stock the inferest on which is paid or guaranteed by the Secretary of State in Council of India. (3) The Order of Court extends to nominal debentures and nominal debenture stock issued under the Local Loans Act, 1875, but the Act only extends to nominal or inscribed stock (*see* Sub-section *m*).

Questions will no doubt arise as to these differences between the powers given by the Sub-sections above referred to and those given by reference to the Order of Court. It is submitted, however, that the powers given by the Act directly, and those given by reference to the Order of Court, are not inconsistent, but that it is the intention of the Act that the powers given by the Sub-sections should be permanent, and so have continuing effect in the event of the Order of Court, which is temporary in its nature, being altered or annulled.

Indian railway investments, to fall within the authority of the Act, whether under the provisions of Sub-section (*i*) or under the reference to the Order of Court, must not be liable to be redeemed within fifteen years of the date of purchase at par, or at some other fixed rate (*see infra*, Section 2, Sub-section 2).

If any question should arise with regard to the word "guaranteed," used in the Order of Court, with reference to Indian Railways, the Courts would in all probability hold that it must be construed as having the same meaning as that attached to it in Sub-section (*i*) of the Act. It must be borne in mind also that the restriction as to price contained in Sub-section 2 of Section 2 of this Act applies to all investments in stock of the kind mentioned in Sub-section (*i*) made under the powers of this Act, whether given directly by that Sub-section, or by the reference in Sub-section (*o*) to the Order of Court.

Full information as to the several investments specified in this Section may be found in Burdett's "Official Intelligence," which is published annually, and is one of the most useful compilations of its kind. And see also "The Statutory Trust Investment Guide," by Marrack, and the List of Securities, compiled by F. C. Mathieson & Sons, appended thereto.

"And may also from time to time vary any such investment."—This enables trustees to vary any investment made upon any such

stocks, funds, or securities as are specified in this Section, without regard to the time at which the investment may have been made (Hume *v.* Lopes, 1892, A. C. 112, overruling *in re* Manchester Royal Infirmary, 43 C. D. 420). The power, however, does not extend to any investment in stocks, funds, or securities other than those mentioned in the Section (*in re* Dick, Lopes *v.* Hume-Dick, 1891, 1 Ch. at p. 430, by Kay, L. J.), and therefore where the instrument creating the trust gives a wider range of investment than that given by the Act an express power to vary investments should be inserted.

It must be borne in mind that the 1st and 7th Sections of The Trust Investment Act, 1889, are still unrepealed. The bodies referred to in Section 7 of that Act will have to consider the effect of the repeal of the Sections enumerating the authorised investments. It is apprehended that Sub-section 1 of Section 38 of The Interpretation Act, 1889 (52 & 53 Vict. c. 63), applies, and that the 7th Section of the Act of 1889 must henceforth be construed as referring to the stocks, funds, shares, or securities in which trustees are authorised by the present Act to invest (and *see in re* Manchester Royal Infirmary, Manchester Royal Infirmary *v.* Attorney General, 43 C. D. 420, at p. 427).

Purchase at a premium of redeemable stocks.

2. (1) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in Section One of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2) Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned or referred to in Sub-sections (*g*), (*i*), (*k*), (*l*), and (*m*) of Section One, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the Sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act.

Section 2.—By the rules of equity, trustees, however ample their power of investment, were not justified in investing in determinable securities (Stewart *v.* Sanderson, 10 L. R. Eq. 26). This Section, however, authorises the investment of trust funds in any of the securities mentioned or referred to in Section 1 of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value, but so, nevertheless, that trustees are not to invest in any stock mentioned or referred to in Sub-sections (*g*), (*i*), (*k*), (*l*), and (*m*) of Section 1, at a price exceeding its redemption value if such stock is liable to be redeemed within fifteen years from the time of investment at par, or at some other fixed rate, or invest in any such stock as is mentioned or referred to in those Sub-sections if it is liable to be redeemed at par or at some other fixed rate, and its price exceeds fifteen per cent. above par or such other fixed rate.

Notwithstanding, however, the provisions of this section, the Court, in exercising its discretion with regard to the investment of cash under its control, would probably, in most cases, give preference to irredeemable securities (Roberts *v.* Morgan, 23 L. R. Ir. 118, and *re* Phelan, *ib.* 336).

Trustees, in exercising the power of investment given by this Act, should, whilst looking to the circumstances of the case and the position of the parties beneficially entitled, bear in mind that it is their duty, as far as may be, to keep the fund intact for the persons entitled in remainder (Hume *v.* Richardson, 4 De G. F. & J. 29).

Sub-section 3.—This enables trustees to retain redeemable securities until the time fixed for redemption without incurring any liability for loss occasioned thereby to the trust estate. Trustees, however, when retaining redeemable securities, must act in good faith and without negligence.

Discretion of trustees.

3. Every power conferred by the preceding Sections shall be exercised according to the discretion of the trustee, but subject to any consent required

by the instrument, if any, creating the trust with respect to the investment of the trust funds.

Section 3.—"According to the discretion of the trustee."—The Court will not interfere with the discretion of trustees in the exercise of a power to vary securities unless such power is exercised in an improper manner or upon unreasonable grounds (Lee *v.* Young, 2 Y. & C. C. 532).

"Subject to any consent required by the instrument, if any, creating the trust."—If consent be necessary to the exercise of the power, it must be procured in strict accordance with the requirements of the trust instrument. A prospective consent is bad, and would not protect trustees if charged with breach of trust (Child *v.* Child, 20 Beav. 50). So a subsequent consent will not exonerate the trustees (Bateman *v.* Davis, 3 Madd. 98) unless the person whose consent is necessary afterwards by some act of his shows his acquiescence, as where he receives dividends arising from the new investment without objection (Stevens *v.* Robertson, 37 L. J., N. S., Ch. 499, and *re* Massingberd, Clark *v.* Trelawney, 63 L. T., N. S., 296). And in some cases subsequent acquiescence would be ineffectual to shield the trustees—as, for instance, where the instrument creating the trust expressly requires a previous consent to any investment by the trustees (*see* Stevens *v.* Robertson, *supra*). If the trust instrument requires the consent to be in writing, that requirement should be strictly complied with (Cocker *v.* Quayle, 1 R. & My. 535, and Worthington *v.* Evans, 1 S. & S. 165). Consent will be presumed after a considerable lapse of time (*re* Adrian Birch, 17 Beav. 358).

Application of preceding Sections.

4. The preceding Sections shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

Section 4.—"And the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust."—Having regard to these words, the true mode of construing the power of investment given by the preceding Sections is to read into the instrument creating the trust the various enumerated securities, unless

they are excluded by the express language of such instrument (*in re* Dick, Lopes *v.* Hume Dick, 1891, 1 Ch. 423 at p. 429, by Fry, L. J., and Hume *v.* Lopes, 1892, A. C. 112, at p. 117, by Lord Field).

Enlargement of express powers of investment.

5. (1) A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

(*a*) On mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

(*b*) On any charge, or upon mortgage of any charge, made under The Improvement of Land Act, 1864.

27 & 28 Vict. c. 114.

(2) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorising the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

(3) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorising the investment, invest in any nominal debentures or nominal debenture stock issued under The Local Loans Act, 1875.

38 & 39 Vict. c. 83.

(4) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorising the invest-

ment, invest in any securities of the Government of the Isle of Man, under The Isle of Man Loans Act, 1880. 43 & 44 Vict. c. 8.

(5) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in or upon the security of mortgage debentures duly issued under and in accordance with the provisions of The Mortgage Debenture Act, 1865. 28 & 29 Vict. c. 78.

Section 5, *Sub-section* 1 (*a*).—This is practically a re-enactment of Section 9 of The Trustee Act, 1888 (51 & 52 Vict. c. 59), which Act, with the exception of Sections 1 and 8, is repealed by the present Act.

Prior to the passing of The Trustee Act, 1888, and the cases mentioned below, the opinion of conveyancers and text-book writers was in favour of the view "that securities upon chattel interests for long terms of years not burdened with rent or convenants, such as the terms created by settlement or will, with a view to raising money for portions or other purposes of family provision, were a suitable mode of investment of money authorised to be invested on real security" (Davidson's "Precedents and Forms in Conveyancing," Vol. 3, p. 37, and "Lewin on the Law of Trusts," 8th edition, p. 337, Section 57). In the case of *in re* Chennell (8 C. D. 492, p. 507) Jessel, M. R., is reported to have said that such an investment "would be justified if the leaseholds were held at a peppercorn rent for a long term without covenants and without impeachment of waste"; but on this *obiter dictum* being brought to his notice in *in re* Boyd's Settled Estates (14 C. D. 626) he expressed his opinion that, as a general rule, long terms of years did not answer the description of "real securities." In this state of uncertainty the law remained until the case of Leigh *v.* Leigh (W. N. 1886, p. 191, S. C. 35, W. R. 121), in which Stirling, J., held that long leaseholds (in the case in question of 1,000 years and 1,500 years respectively, being terms for raising portions) were not "real securities."

The effect of this Sub-section is similar to that of Section 9 of the Act of 1888, and makes an investment upon mortgage of property, held

for a long term of years, a "real security." The Sub-section too, like the corresponding section of the Act of 1888, has a retrospective operation.

To bring the term within the meaning of a real security—

(1) It must at the date of investment being effected have still not less than two hundred years to run.
(2) The rent reserved must not exceed a shilling a year.
(3) The term must not be subject to any right of redemption.
(4) The term must not be subject to any condition for re-entry except for nonpayment of rent.

As to (3), the right of redemption here referred to is not the right which must of necessity, from the nature of the transaction where a mortgage is effected, exist between the trustee, who advances the money, and his mortgagor, but a trust or right of redemption affecting the term in favour of the freeholder or other person entitled in reversion expectant on the term in question.

It would seem that even if the term mortgaged to a trustee complied with the conditions making it convertible under The Conveyancing Acts, 1881 and 1882 (44 & 45 Vict. c. 41, Section 65, and 45 & 46 Vict. c. 39, Section 11), into a freehold, the trustee to whom it is mortgaged could not so convert it, as it would be improper to allow him to change the nature of his mortgagor's estate.

Sub-section 1 (*b*).—This is in effect a re-enactment of that portion of Section 60 of The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), which relates to trustees and is repealed by this Act (*see* Section 51 and Schedule).

Sub-section 2.—This is a re-enactment of the authority given to trustees to invest in debenture stock by The Debenture Stock Act, 1871 (34 & 35 Vict. c. 27), that Act being wholly repealed by the present Act (*see* Section 51 and Schedule).

Sub-section 3.—This is a re-enactment of Section 27 of The Local Loans Act, 1875 (38 & 39 Vict. c. 83), such section being for the purpose of consolidation repealed by this Act.

Sub-section 4.—This is a re-enactment of Section 7 of The Isle of Man Loans Act, 1880 (43 & 44 Vict. c. 8), which Section, so far as it relates to trustees, is repealed by the present Act (*see* Section 51 and Schedule).

Sub-section 5.—This is a re-enactment of Section 40 of The Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78), such Section being repealed by the present Act (*see* Section 51 and Schedule).

It is provided by The Mortgage Debenture Act, 1865, that a company, to entitle it to issue mortgage debentures under the Act, must under its special Act, or its Memorandum of Association, be limited to the following objects:—1. The making of advances of money upon any of the following securities:—(*a*) Lands, messuages, hereditaments, and real property, and all estates and interests therein; (*b*) Rates, dues, assessments, and impositions upon the owners or occupiers of lands or real property imposed by or under the authority of any Act of Parliament, public or private, Royal Charter, Commission of Sewers or Drainage, or other sufficient legal authority; (*c*) Charges or securities upon or affecting lands, messuages, hereditaments, and real property executed, made, given, or issued under the authority of any Act of Parliament, public or private. 2. The borrowing of money on transferable mortgage debentures or upon one or more of the securities above mentioned. And, in addition, the Company must have a paid-up capital of not less than £100,000 in shares of the nominal value of not less than £50, of which not less than one tenth, nor more than one half, must have been paid up.

The securities upon or in respect of which such mortgage debentures may be founded and issued must be securities affecting property in England or Wales of the following descriptions:—(*a*) Lands, messuages, hereditaments, or real property, or some estate or interests therein; (*b*) Rates, dues, assessments, or impositions upon the owners or occupiers of lands, messuages, hereditaments, or real property, imposed by or under the authority of any Act of Parliament, public or private, Royal Charter, Commission of Sewers or Drainage, or other sufficient legal authority; (*c*) Charges upon or affecting lands, messuages, hereditaments, or real property executed, made, given, or issued under the authority of any Act of Parliament, public or private. But from the securities described in paragraph (*a*) the enabling Act excepts securities upon mines or mineral properties, quarries, brickfields, factories, mills, and other buildings or works for manufacturing purposes, and also securities upon leasehold estates determinable upon a life or lives, and not renewable, or held for a term, of which at the date of the security less than fifty years shall be unexpired, or which are subject to any rent beyond a nominal rent, or a ground rent.

Power to invest notwithstanding

6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase or on mortgage of any land, notwith-

drainage charges.

10 & 11 Vict. c. 32.

standing the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

Section 6.—The object effected by this Section is the practical re-enactment of Section 37 of The Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101); Section 53 of The Landed Property Improvement (Ireland) Act, 1847 (10 & 11 Vict. c. 32); and Section 61 of The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), severally repealed by this Act (*see* Section 51 and Schedule).

Trustees not to convert inscribed stock into certificates to bearer.

26 & 27 Vict. c. 73.
33 & 34 Vict. c. 71.
38 & 39 Vict. c. 83.
40 & 41 Vict. c. 59.

7. (1) A trustee, unless authorised by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following Acts, that is to say:

(*a*) The India Stock Certificate Act, 1863;

(*b*) The National Debt Act, 1870;

(*c*) The Local Loans Act, 1875;

(*d*) The Colonial Stock Act, 1877.

(2) Nothing in this section shall impose on the Bank of England or of Ireland, or on any person authorised to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted.

Section 7.—This section practically re-enacts Section 4 of The India Stock Certificate Act, 1863 (26 & 27 Vict. c. 73); Section 29 of The National Debt Act, 1870 (33 & 34 Vict. c. 71); Section 21 of The

Local Loans Act, 1875 (38 & 39 Vict. c. 83); and Section 12 of The Colonial Stock Act, 1877 (40 & 41 Vict. c. 59), which are severally repealed by the present Act (*see* Section 51 and Schedule).

Loans and investments by trustees not chargeable as breaches of trust.

8. (1) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.

(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as

a person acting with prudence and caution would have accepted.

(4) This Section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the Twenty-fourth day of December, One thousand eight hundred and eighty-eight.

Section 8, *Sub-section* 1.—This is in effect a re-enactment of Sub-section 1 of Section 4 of The Trustee Act, 1888, that Section being repealed by the present Act (*see* Section 51 and Schedule). The Sub-section referred to is in the following terms:—"No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situated or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report, and that the loan was made under the advice of such surveyor or valuer expressed in such report. And this section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend." There is some difference between the wording of the repealed Sub-section and that of the Sub-section of the present Act now under consideration, and it will be observed that the provision at the end of the repealed Sub-section that the "Section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which a trustee can lawfully lend," is omitted. The two Sub-sections are, however, it is conceived, the same in effect.

Previously to the passing of The Trustee Act, 1888, the rule was that a trustee before advancing trust money on mortgage ought to make due inquiry with regard to the value of the property offered as

security (Bell *v.* Turner, 17 L. R., Eq. 439), and to have an independent valuation of it made on his own behalf (Ingle *v.* Partridge, No. 2, 34 Beav. 411) by a competent valuer, with local knowledge sufficient to enable him to arrive at a valuation (Budge *v.* Gummow, 7 L. R., Ch. App. 719, 722; Fry *v.* Tapson, 28 C. D. 279), who had been instructed that the advance was to be made out of trust money, and that it was desired to ascertain the actual value of the property (*in re* Olive, Olive *v.* Westerman, 34 C. D. 70). And trustees infringing the rule, although acting in good faith, were made liable, such infringement being a breach of trust, and even the employment by them of competent solicitors was held to be no excuse, on the ground that the appointment of a competent valuer was not within the scope of the solicitor's employment, but was a matter as to which the trustees ought to have exercised their own judgment (Fry *v.* Tapson, 28 C. D. 268, 280, 282).

It was also laid down by the Courts of Equity that the amount in proportion to the value of the property proposed as a security which trustees with power to invest upon mortgage ought to advance was two-thirds where the property was of a permanent value, as freehold land (Stickney *v.* Sewell, 1 My. & Cr. 8; Macleod *v.* Annesley, 16 Beav. 600; Ingle *v.* Partridge, No. 2, 34 Beav. 411; Smethurst *v.* Hastings, 30 C. D. 498; Learoyd *v.* Whiteley, 12 App. Ca. 727, 733), and one half where the property was house property (Norris *v.* Wright, 14 Beav. 291; Fry *v.* Tapson, 28 C. D. 268).

It has been said that the rule was only a general rule (*see* "Lewin on Trusts," 9th ed. p. 357), and not a hard and fast one (*in re* Olive, Olive *v.* Westerman, 34 C. D. at p. 73; Learoyd *v.* Whiteley, 12 App. Ca. pp. 733, 734); still a trustee who disregarded it took upon himself a great risk (*in re* Salmon, Priest *v.* Uppleby, 42 C. D. 351, 369, 370). And it is clear that, whilst on the one hand, where trustees, acting in good faith upon the representations of competent persons as to the permanency of the value of the mortgaged property, or as to an anticipated advance in such value, had to some slight extent infringed the rule, they would probably have been protected by the Court. On the other hand, there are cases where it has been decided that upon certain classes of real property, as, for instance, premises depending for their value upon some trade carried on upon them, trustees, according to circumstances, would not be justified in making advances at all, or would only be justified in making advances far smaller, in proportion to the estimated value, than those authorised by the rule (Stickney *v.* Sewell, 1 My. & Cr. 8; Royds *v.* Royds, 14 Beav. 54; Stretton *v.* Ashmall, 3 Dr. 12;

Budge *v.* Gummow, 7 L. R., Ch. App. 719; and Learoyd *v.* Whiteley, 12 App. Ca. 733).

The rules governing advances of trust money were, however, materially altered by The Trustee Act, 1888. After the commencement of that Act no trustee who prior to such commencement had advanced or thereafter should advance trust money on mortgage security, in accordance with the terms of the trust instrument, could be charged with breach of trust, by reason of the proportion borne by the amount of the loan to the value of the property forming the security, if it were found that the trustee when making the loan was acting upon a report as to value made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed by the trustee independently of any owner of the property, and with a view to the particular investment (*in re* Walker, Walker *v.* Walker, 59 L. J., N. S., Ch. 386), whether such surveyor or valuer carried on business in the locality where the property was situated or elsewhere, and that the amount of the loan did not exceed two equal third parts of the value of the property as stated in such report. The Trustee Act, 1888, abolished the rule which required the valuer employed to be a person having local knowledge and experience (*see* Budge *v.* Gummow, *ubi supra*).

The rules introduced by Section 4 of the Act of 1888 will continue to govern advances of trust money upon mortgage security, since the Section referred to is in effect re-enacted and restored by the present Act.

It might be suggested that the omission from this Sub-section of the provision contained in the latter part of Sub-section (1) of Section 4 of the Act of 1888, as to the Section applying to a loan on any property of any tenure, "whether agricultural or house or other property," restored the rule of equity as to two-thirds on land and one-half on houses. It is, however, submitted that the provision referred to was inserted in the Sub-section of the repealed Act by way of abundant caution, rather than because it was absolutely necessary, and that the language of the Sub-section of the present Act, at least, is sufficient to abrogate the rule without any special provision, for it extends to a trustee lending money on the security of any property, if he acts on a report as to value in accordance with the terms of the Act, and the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report. Of course the property upon the security of which the advance is made must be of such a kind as the trustee is authorised by law, or by the instrument creating

the trust, to invest upon the security of. And it must be borne in mind that neither the repealed Act of 1888, nor this sub-section of the present Act, has enlarged the powers of trustees as to the description of property to be accepted as a security, or absolved them when investing trust moneys from using the reasonable caution of prudent men.

It should be remembered that the duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; it is rather to take such care "as an ordinarily prudent man would take if he were minded to make an investment for the benefit of other people, for whom he felt morally bound to provide" (*in re* Whiteley, Whiteley *v.* Learoyd, 33 C. D. 347, at p. 355). And this shows in effect that the true rule which should govern the conduct of trustees is, that a trustee in performing the duties incident to his position should act as an ordinarily prudent man of business would act if acting for other persons, with a due regard to the respective positions and interests of such persons—a standard far different from that which is supposed to be the guide for trustees.

When trustees have complied with the requirements of the Act as to valuation, and have otherwise acted with prudence, they will not, it is conceived, be liable for loss through subsequent depreciation (*in re* Whiteley, Whiteley *v.* Learoyd, 33 C. D. 347, affirmed 12 App. Ca. 727, *nom.* Learoyd *v.* Whiteley).

The change introduced by the Act of 1888 in the rules of equity as to the proportion of the advance to the value of the security was a much needed one, and probably relieved the majority of trustees having power to invest on mortgage from liability; for in practice the rule was constantly infringed, as a rigid adherence to it would have almost shut out trustees from investments on house property, the owners of which would rarely be content with so small an advance as one half of the actual value.

Trustees, notwithstanding the latitude now given them, must not forget their usual prudence and circumspection, but bear in mind that they are not warranted in advancing trust moneys upon contributory mortgage, or in doing what is sometimes done by careless trustees—namely, lending the trust moneys on a second, third, or other postponed security. In such cases the law wholly ignores the transaction, and the trustee so acting does so at his peril, and must replace the money advanced, and make good any loss.

Sub-section 2.—This is a re-enactment of Sub-section 2 of Section 4 of the Act of 1888.

By Section 2 of The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), it was enacted that "Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold." And by Section 3 of the same Act it was provided that "Trustees who are either vendors or purchasers might buy or sell without excluding the application of the second section." This Act, for the purposes of consolidation, repeals Section 3 of the Act referred to (*see* Section 51 and Schedule), and re-enacts it (*see* Section 15, *infra*).

By Section 13 of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it was enacted that "Under a contract to sell or assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion."

And by the 66th Section of the same Act it is provided that trustees, executors, and other persons in a fiduciary position are not to be deemed guilty of neglect, or breach of duty, or become in any way liable for omitting to negative in any contract the inclusion of the provisions or stipulations of that Act.

Trustees, however, were not by either of the Acts referred to relieved, when investing on leasehold security, from seeing that the title was in all respects a marketable one, and therefore of investigating the lessor's title.

The provision made by The Trustee Act, 1888, was much needed, for the result of the practice, which had grown up, of inserting in agreements for leases, and in the conditions under which leaseholds were sold, a stipulation that production of the lessor's title should not be required, combined with The Vendor and Purchaser Act, 1874, and The Conveyancing and Law of Property Act, 1881, was practically to debar trustees, unless they were willing to incur the liability of being charged as for a breach of trust, from investing on leasehold securities.

It must, however, be borne in mind by trustees that the obligation to require production of the lessor's title is not absolutely removed, but only where the title accepted is such as in the opinion of the Court a person acting with prudence and caution would have accepted. And it is conceived that, save perhaps in the case where the freehold title is very well known, a trustee would not be justified in advancing trust money upon the security of a recently granted lease, but should require such length of title to the leasehold interest as afforded, from

lapse of time and other circumstances, a presumption that the lease is subsisting and unimpeachable.

Sub-section 3.—This is a re-enactment of Sub-section 3 of Section 4 of the Act of 1888.

Before the passing of the Act of 1888 the rule of Equity was that trustees, empowered or directed to lay out trust money in the purchase of real estate, ought not to accept a title unless strictly marketable, and departure from it was only allowed where the title was substantially a safe holding one, and the acquisition of the particular property was of importance to the trust (*re* Sheffield & Rotherham Railway Company, 1 Sm. & Giff. App. IV.), or where the property purchased was a large one, and the want of a marketable title extended only to small and outlying portions of it. And the rule applicable to trustees having power to advance trust money on real or leasehold security was that in so doing they ought to see that the title to the property proposed as a security was a marketable one.

Prior to The Vendor and Purchaser Act, 1874, a title to real estate to be a marketable one must have gone back over a period of sixty years at the least, but the period of forty years has now been substituted by that Act, which by its First Section enacts as follows:—

"In the completion of any contract of sale of land made after the 31st day of December, One thousand eight hundred and seventy-four, and subject to any stipulations to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require, in the place of sixty years, the present period of such commencement. Nevertheless, earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required."

As to the meaning of the word "land" in Acts of Parliament, see Section 3 of The Interpretation Act, 1888 (52 & 53 Vict. c. 63).

Before the enactment comprised in Section 2 of The Vendor and Purchaser Act, 1874, in order to make a marketable title to leasehold property (other than property held under a bishop's lease), it was necessary to show the title to the freehold as well as the title to the term.

It will be seen, therefore, that before the passing of The Trustee Act, 1888, trustees for purchase, in the absence of an express authority in their trust instrument, could not with safety purchase real estate under a contract containing stipulations restrictive of their right to require a title going back over a period of forty years at the least (*ex parte* the Governors of Christ's Hospital, 2 Hem. & M. 166, 168).

And although on purchasing property held for a term of years they might have dispensed with the production of the freehold title, they were bound to require a title commencing with the original lease, and showing the subsequent assignments. Since the passing of the Act of 1888, however, trustees having authority to purchase or invest on the security of any property, are no longer liable to be charged with breach of trust merely for having accepted a title shorter than that which they might legally have required. But as the title accepted must be such as, in the opinion of the Court, a person acting with prudence and caution would have accepted, trustees must still use circumspection in exercising trusts for purchase or investment, and would, it is conceived, be liable for accepting a title commencing at a recent date, save perhaps where the title was a very well known one, or, in the case of a purchase, where the property was small and its possession of importance to the trust.

The word "property" in this Act includes "real and personal property, and any estate and interest in any property, real or personal" (*see* Section 50, *infra*), and therefore extends, it is apprehended, to leaseholds, so that a trustee purchasing or investing on the security of property of that description would, where the term was of old creation, be justified in dispensing with the full title, provided that the creation of the term were shown, together with the mesne assignments for the past forty or fifty years.

Sub-section 4.—This Sub-section is practically a re-enactment of Sub-section 4 of Section 4 of The Trustee Act, 1888.

The word "investment" in this Sub-section extends, it is conceived, as well to investments in the purchase of as to investments on the security of property to which the Section applies.

It will be observed that the retrospective force given to the Act by this Sub-section is not to operate in respect to any investment made before the commencement of the Act, where an action or other proceeding was pending with reference thereto on the 24th day of December, 1888, the time when the Act of 1888 was passed and came into operation.

Liability for loss by reason of improper investments.

9. (1) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised

investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

(2) This Section applies to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the Twenty-fourth day of December, One thousand eight hundred and eighty-eight.

Section 9.—This is a re-enactment of Section 5 of The Trustee Act, 1888, that Section being repealed by the present Act (*see* Section 51 and Schedule).

A trustee is not entitled to the protection afforded by this Section unless the investment which proves deficient was a proper investment at the time when made in all respects other than value (*in re* Walker, Walker *v.* Walker, 59 L. J., Ch. 386).

The object of the Section is to provide that when a trustee has advanced more money on mortgage of a property than was reasonably prudent, and the estate fails, then he is not to be chargeable with the whole, but only with so much as would have been a loss if you take the real value at the time of investment, and not the value the trustee put upon it (*in re* Walker, Walker *v.* Walker, *ut supra*). And since the passing of the Act of 1888 the proper course, therefore, is to value the security, and to charge the trustees with any excess in the amount of the loan over the sum which ought properly to have been advanced in proportion to the value of the security at the time when the advance was made.

Where this Section does not apply, the practice of the Courts, where the security is deficient, is to order the security to be realised and to charge the trustees with the insufficiency (Stickney *v.* Sewell, 1 My. & Cr. 8; Ingle *v.* Partridge, No. 2, 34 Beav. 411; *in re* Whiteley, Whiteley *v.* Learoyd, 33 C. D. at p. 354). And where in such a case a trustee who invests on an insufficient security retires, the new trustees may realise the security without notice to the old trustee and charge him with the deficiency (*in re* Salmon, Priest *v.* Uppleby, 42 C. D. 351).

Sub-section 2.—It will be observed that the Section is to have a retrospective operation, save where some action or other proceeding with reference to the investment was pending on the 24th day of December, 1888, the time when the Act of 1888 came into operation.

PART II.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

Appointment of New Trustees.

Power of appointing new trustees.

10. (1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

(2) On the appointment of a new trustee for the whole or any part of trust property—

(*a*) The number of trustees may be increased; and

(*b*) A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or

trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

(*c*) It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this Section from his trust unless there will be at least two trustees to perform the trust; and

(*d*) Any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(3) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(4) The provisions of this Section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this Section.

(5) This Section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(6) This Section applies to trusts created either before or after the commencement of this Act.

Sections 10, 11, and 12 re-enact, with some slight verbal alterations, Sections 31, 32, and 34 of The Conveyancing Act, 1881, Section 5 of The Conveyancing Act, 1882, and Section 6 of The Conveyancing Act, 1892, and deal with the appointment of new trustees, and the vesting of the trust property consequent on such appointment. Taking the Sections and Sub-sections in question in order, the following notes may assist in the elucidation of their provisions.

The cases in which the powers conferred by Section 10 (1) come into operation range themselves under six heads.

"Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is"—

i. Dead.
ii. Remains out of the United Kingdom for more than twelve months.
iii. Desires to be discharged from the trusts or powers reposed in or conferred on him.
iv. Refuses to act therein.
v. Is unfit to act therein.
vi. Is incapable of acting therein.

The trustee may be—

i. Original.
ii. Substituted (*a*) by a Court; (*b*) or otherwise.

In this connection the definition of "Trustee" contained in Section 50 should be borne in mind. It includes an executor or administrator, and a trustee (not being a mortgagee) whose trust arises by construction or implication of law, as well as an express trustee, and does not exclude the official trustees of charitable funds. By "Original Trustee" is meant a trustee nominated and appointed in the original document, whether will, settlement, or otherwise, creating the trust.

A "Substituted Trustee" is either one appointed by the Court on a petition, summons, action, or other proceeding, or a trustee appointed

by a person having a valid power of so doing, or may be one to whom the powers of trustee devolve by operation of law, and this last case seems to be covered by the words "or otherwise."

Taking the cases in order:—

(i.) *Where a trustee is dead.*

It should be borne in mind that where a sole trustee dies, trust and mortgage estates now (except copyholds), by virtue of The Conveyancing Act, 1881, Section 30, vest in his personal representatives.

(ii.) *Remains out of the United Kingdom for more than twelve months.*

The months here mean calendar months in accordance with The Interpretation Act, 1889 (52 & 53 Vict. c. 63, Section 3).

As to this being a good ground for appointing a new trustee in the place of such absent trustee, the case of *re* Coates to Parsons (34 C. D. 370) is an authority in point (*see also re* Walker & Hughes's Contract, 24 C. D. 698). This Sub-section indicates a period of absence which sets at rest any question as to what amount of absence is sufficient to justify the exercise of the power—a question which may still arise where the Court is called on to exercise its power of appointing, on the ground that a trustee is out of the jurisdiction which is treated of hereafter, and on which the case of Hutchinson *v.* Stephens (5 Sim. 499) is a useful decision.

(iii.) *Desires to be discharged from the trusts or powers reposed in or conferred on him.*

This simply gives a statutory power of retiring, which previously all well-drawn forms of powers in that behalf contained; and this power can, of course, be excluded, though it would be unwise and unjust so to do, since by Sub-section 5 of the Section now under discussion it applies only if and as far as a contrary intention is not expressed in the instrument.

It may be as well to note here (though the remark applies equally to other cases of a trustee retiring) that he should not part with his control over the fund until the new trustee (if any) is properly appointed (Pearce *v.* Pearce, 22 Beav. 248).

(iv.) *Refuses to act therein.*

Refusal to act may be either before assenting to become a trustee, or after it. In the former case it is the same as disclaimer, and this Sub-section therefore applies to the case of a disclaimer. It is true there has been no decision clearly laying down that "refusal" does include disclaimer; but in D'Adhemar *v.* Bertrand (35 Beav. 19) it was

assumed that the similar Section in Lord Cranworth's Act, Section 27, did comprise disclaimer. Up to the instant of disclaimer the estate vested in the trustee remains in him, and disclaimer of the powers of trustee will operate to disclaim the estate without any formal act (*re* Birchall, Birchall *v.* Aston, W. N. 1889, 31). No express assent is necessary to vest the estate in a trustee; the mere appointment does this; but obviously no person is bound to accept such an onerous position, and may decline it, even if, for instance, he may before the death of a testator have agreed to be a trustee of his will. Disclaimer may be evidenced by conduct without express declaration.

In connection with the subject of disclaimer, reference may here be made to Section 52 of the The Conveyancing Act, 1881, coupled with Section 6 of The Conveyancing Act, 1882, under which one trustee may disclaim a power without vitiating the exercise of it by the remaining trustees, in whom it will vest, and be validly exerciseable, thus putting disclaimer of a power on the same footing as disclaimer of an estate.

(v.) *Is unfit to act therein.*

As to the exact nature of the unfitness which will authorise the exercise of the power of appointment there are not many decisions, for the obvious reason that in cases where it is proposed to remove a trustee out of Court for unfitness, the trustee will usually retire of his own accord, and then the case falls under the head of the trustee being desirous of retiring, or if he declines to do so an application to the Court might then have to be made. This much, however, is clear, that bankruptcy is unfitness, and a trustee can be called upon to resign who is bankrupt (*see re* Adams's Trust, 12 C. D. 634, p. 634; *re* Barker's Trusts, 1 C. D. 43; and Section 25 (1) of this Act). As to the principles which will guide the Court in exercising its jurisdiction of removing a trustee for unfitness—a jurisdiction of a delicate character—the case of Letterstedt *v.* Broers (L. R. 9 App. Ca. 371) is useful.

The result appears to be that where it is clear that the Court would exercise its inherent jurisdiction of removing a trustee for "unfitness," it would be equally safe for the person having the power of appointment as indicated by this Section to exercise it, and insist on the retirement of a trustee who is clearly unfit, and if he resist and render a resort to the Court necessary he may have to pay the costs so occasioned.

(vi.) *Is incapable of acting therein.*

Under this head comes lunacy or unsoundness of mind (where a

person has not been found lunatic, but is still incapable of managing his own affairs), but not infancy or coverture.

As to lunacy, the case of *re* Elizabeth Blake (W. N. 1887, 173) is decisive, that the Section under discussion would apply, as it is merely a re-enactment of Section 31 of The Conveyancing Act, 1881. And it is apprehended the same rule would apply to a case of unsoundness of mind, though not so found. Marriage is clearly not such an incapacity as is here intended. In fact, a married woman can—under The Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75), by virtue of Section 1, Section 18, and Section 24 of that Act—act as a trustee (*see re* Hawksworth, W. N. 1887, p. 113).

The position of an infant appointed a trustee is peculiar. Infancy is only a disqualification *sub modo*. Where the Court has been called upon to appoint a new trustee in the place of an infant trustee, it has done so without prejudice to any application by the infant to be restored to the trusteeship on coming of age. It is difficult to see in what manner the power could be exercised by a private person: hence this Section cannot apply to the case of incapacity arising from infancy, and an application to the Court would be necessary (*re* Brunt, W. N. 1883, 220; and *re* Tallatire, W. N. 1885, p. 191).

Returning to the Section, it next deals with the persons who can exercise the power: "*Then the person or persons nominated for the purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may*," &c.

Thus the persons are:—

(i.) The person or persons nominated by the instrument, if any, creating the trust.

(ii.) The surviving or continuing trustees or trustee.

(iii.) The personal representatives of the last surviving or continuing trustee.

With each of these we shall deal in order. Dealing then with (i.)—The whole of this Section is subject to Sub-section 5, which provides that it "applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained." As to what is "a contrary intention" within the meaning of this Sub-section, see note to Sub-section 5 of this Section, *infra*.

The phrase "*the instrument, if any, creating the trust*" shows that

the powers of this Section apply to trusts, whether created by writing or not, which is made more evident by the definition in Section 50, where "trust" is defined as including "implied and constructive trusts." The term "instrument" includes deeds of all kinds, wills, Act of Parliament (*see* Section 50 of this Act), charter, and, it is apprehended, a simple declaration of trust, &c., in writing, even though not under the hand and seal of the creator of the trust.

"*Or if there is no such person, or no such person able and willing to act.*"—Even if there are persons nominated to appoint, yet if they decline, or cannot agree to appoint, as where husband and wife are living apart and refuse to concur in appointing a new trustee, there the power will be exerciseable by the other persons mentioned in the Section (*re* Sheppard's Settlement Trusts, W. N. 1888, p. 234).

(ii.) The surviving or continuing trustees or trustee for the time being.

By "continuing trustee" is meant one who is to continue to act in the trusts after the completion of the appointment (*re* Coates to Parsons, 34 C. D. 370), and does not include a trustee who has made up his mind to retire (*re* Norris, Allen *v.* Norris, 27 C. D. 333), unless he is willing to act for the purpose of filling up the impending vacancy. "Continuing trustee" does then include such a retiring trustee, and he is entitled to join in appointing if he so desires, since Sub-section 4 of the Section now under discusion enacts that "the provisions of this Section . . . . relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this Section." There is, however, no necessity for his doing so if he does not wish to (*re* Norris, Allen *v.* Norris, *ubi supra*).

This Statute imposes no obligation, either on a continuing sole trustee or the personal representatives of a deceased trustee, to appoint new trustees (Peacock *v.* Colling, 33 W. R. 528; *in re* Sarah Knight's Will, 26 C. D. 82).

(iii.) The personal representatives of the last surviving or continuing trustee.

This would include the executor of such a trustee, and the administrator of such a trustee who had died intestate (*see re* Shafto, 29 C. D. 247).

By empowering the appointor to appoint "*another person or other persons to be a trustee or trustees*," the Statute implies that the appointor ought not to appoint himself (*see re* Skeats's Settlement, Skeats *v.* Evans, 42 C. D. 522; and generally as to who should be appointed, *see* "Lewin on Trusts," 9th edition, pp. 748–9).

Finally, it should be noticed that, whatever the nature of the trust, whether created by instrument or not, the power of appointing new trustees must be exercised "by writing," and, though not apparently necessarily by deed, it is usual and proper that it should be by deed.

(2) *On the appointment of a new trustee for the whole or any part of the trust property—*

(*a*) *The number of trustees may be increased.*

By reason of Section 1 (1) (*b*) of The Interpretation Act, 1889 ("words in the singular shall include the plural, and words in the plural shall include the singular"), the Sub-sections (*a*), (*b*), (*c*), and (*d*) of this Sub-section apply also on the appointment of new trustees.

The power of increasing the number of trustees only arises when an appointment is being made to supply a vacancy in the trusteeship, unlike the power conferred on the Court by Section 25 of this Act, which is a re-enactment of Section 32 of The Trustee Act, 1850, and can be exercised even though there is no vacancy (*re* Gregson's Trusts, 34 C. D. 209, and *re* Brackenbury's Trust, 10 Eq. 45).

(*b*) *A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.*

There have been conflicting decisions, both of puisne Courts, on the meaning of Section 5 in The Conveyancing Act, 1882, repealed by this Act, and replaced by this Sub-section; and, according to the later of these cases (Savile *v.* Couper, 36 C. D. 520), the Section so repealed authorised the appointment of a separate set of trustees for a part of the trust property held on distinct trusts only when an appointment is being made of new trustees of the whole property. *In re* Paine's Trusts (28 C. D. 725) was a case under the Trustee Act, and not in point on the construction of this Section. But all doubt was set at rest by the enactment of Section 6 of The Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), which enabled trustees to be appointed for separate parts of the property, though no trustee be appointed of other parts, which Section has been repealed by this Act, and the Sub-section now under discussion replaces it.

Under the Trustee Acts separate sets of trustees have been appointed for separate trusts (*re* Cotterill's Trusts, W. N. 1869; *re* Cunard's Trusts, 27 W. R. 52; and *re* Moss's Trusts, 37 C. D. 513).

The Section also applies to cases where the trusts of portions of the estate may be separate for a time, but eventually coalesce (*re* Hetherington's Trusts, 34 C. D. 211).

(*c*) *It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this Section from his trust unless there will be at least two trustees to perform the trust.*

In appointments by the Court it is clearly the practice not to discharge a trustee unless there is another appointed to take his place, except when the trust is virtually at an end. Thus, where one of three trustees is a lunatic, the Court will not appoint the other two trustees, in the place of the three, to carry out the trust (*in re* Aston, 23 C. D. 217; *in re* Martyn, 26 C. D. 745; *in re* Lamb's Trusts, 28 C. D. 77; Davies *v.* Hodgson, 32 C. D. 225; *in re* Gardiner's Trust, 33 C. D. 590). The Court will only deviate from this rule, and make such an appointment, if the trustees have no duty to perform but to distribute a fund which is immediately divisible. It will adhere to the ordinary rule if there is a continuing trust as regards even a relatively small part of the trust fund.

(*d*) *Any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.* (*See* Section 12, *infra.*)

(3) *Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.*

This Sub-section is merely for the purpose of bridging over the period that must frequently and inevitably elapse before all the proper assurances for vesting the trust property in the new and continuing trustees have been carried through, and permits the trustees to act as though their appointments were complete, and to have all the powers and authorities of an original trustee before the actual vesting has taken place.

(4) *The provisions of this Section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this Section.*

This merely implies that, for the purpose of appointing a new trustee in the place of a dead trustee, one who dies in the lifetime of a testator comes within the Section, though in such case his personal representative could not appoint a new trustee as the personal representative of a deceased trustee (Nicholson *v.* Field, 1893, 2 Ch. 511, following *re* Ambler's Trusts, 59 L. J. 210).

The case of a refusing or retiring trustee who is willing to concur in appointing a new trustee has been already dealt with under notes to (ii.) above, p. 60.

(5) *This Section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.*

A mere enumeration of certain events upon which the power is to arise does not exclude its arising on the other events mentioned in the Act (Cecil *v.* Langdon, 28 C. D. 1; *re* Coates *v.* Parsons, 34 C. D. 370; and *re* Walker & Hughes's Contract, 24 C. D. 698).

(6) *This Section applies to trusts created either before or after the commencement of this Act.* (*See* Section 54 of this Act.)

Retirement of trustee.

11. (1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting

the trust property in the continuing trustees alone shall be executed or done.

(3) This Section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4) This Section applies to trusts created either before or after the commencement of this Act.

The powers of this Section come into play under the following conditions:—

(i.) There must be more than two trustees.

(ii.) The one desiring to retire must declare by deed his desire of being discharged.

(iii.) The co-trustees, and such other person as is empowered to appoint trustees, must consent to his discharge, and to the vesting in the co-trustees of the trust property.

This Section applies only to a case of disclaimer of trusts connected with property, and not to a mere power unconnected therewith, which is dealt with by Section 6 of The Conveyancing Act, 1882, and which permits mere powers to be disclaimed.

Sub-section 2 should be read in connection with Sub-sections 2, 3, and 4 of Section 12 of this Act.

Vesting of trust property in new or continuing trustees.

12. (1) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

(2) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this Section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3) This Section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

(4) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5) This Section applies only to deeds executed after the Thirty-first of December, One thousand eight hundred and eighty-one.

Sub-section 1.—This simple and effective method of vesting the trust property was legislatively enacted by Section 34 of The Conveyancing Act, 1881. The subject matter of the trust which can be so vested must be—

(1) Any estate or interest in any land.
(2) Any estate or interest in any chattel.
(3) The right to recover and receive any debt or other thing in action.

But does not include (Sub-section 3)—

(1) Any legal estate or interest in copyhold or customary land.

(2) Land conveyed by way of mortgage.

(3) Any share, stock, annuity, or property transferable only in books kept by a company or other body, or in manner directed by or under Act of Parliament.

"Land" is defined in this Act to include manors, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land (*see* Section 50).

It is to be remarked that the vesting declarations must be in the same document as the appointment of new trustees, and that the document must be a deed.

As to stamping such a deed, Hadgett *v.* Commissioners of Inland Revenue (3 Ex. D. 46) shows that such a document will have to be stamped as an appointment, and also as containing a vesting order.

"*The persons who by virtue of the deed become and are the trustees for performing the trust.*"—These persons are of course the continuing trustees and the new trustee.

(3) The first Clause of this Sub-section has in view the protection of the rights of the lord of the manor, wherein any copyhold property belonging to the trust is situate. The lord having usually the right to some fee on the admission of a new tenant, this right is preserved by the Section, which does not render unnecessary the usual surrender and admission. In cases, then, where there is copyhold property comprised in a trust, it may be necessary to file a petition or take out a summons for a vesting order of the property, and then to get admission in the usual and recognised manner.

"*Land conveyed by way of mortgage.*"—This exception was doubtless inserted to prevent the trusts appearing on the title to the mortgaged land: a transfer will in such cases be necessary, or, if not obtainable, a vesting order as before (Harrison's Settlement, W. N. 1883, 31).

"*Any such share,*" &c., is intended to preserve the statutory mode of transfer indicated in the Companies Acts or other Statutes under which any company is incorporated, and according to which such share, stock, annuity, or other property will have to be transferred.

(5) This Sub-section merely states that vesting declarations, such as are above referred to, can only be effectively included in deeds executed after 31st December, 1881.

If one new and sole trustee is to be appointed in place of one or more old trustees, this Section would appear to cover it, since by The Interpretation Act, 1889 (52 & 53 Vict. c. 63, Section 1), the

singular includes the plural, and *vice versâ*, unless a contrary intention appears.

As to the costs relating to the appointment of new trustees see Harvey *v.* Olliver (W. N. 1887, p. 149).

Purchase and Sale.

Power of trustee for sale to sell by auction, &c.

13. (1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

(2) This Section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3) This Section applies only to a trust or power created by an instrument coming into operation after the Thirty-first of December, One thousand eight hundred and eighty-one.

This Section is merely a re-enactment of Section 35 of 44 & 45 Vict. c. 41, which gave statutory force to the common form provisions of a power of sale or trust for sale.

It would obviously be out of place to enter into a detailed discussion here of the principles which should guide trustees in exercising a power of sale: these are adequately and fully treated of in "Lewin on Trusts," 9th edition, Cap. xviii.

Under this Section, wherever there is a *trust for sale*, or a *power of*

sale (as to which see below), created since 31st December, 1881, the trustees may sell or—

i. Concur with any other person in selling (*a*) all or (*b*) any part of the property;
ii. Subject or not to prior charges;
iii. Together or in lots;
iv. By public auction or private contract;
v. Subject to any conditions the trustees think fit;
vi. With power to vary or rescind the contract;
vii. Unless there be any contrary intention expressed in the instrument.

A trustee cannot, after the institution of a suit to administer the trusts of which he is trustee, enter into a contract for sale without the consent of the Court.

As to the general duties of trustees who desire to exercise a power of sale, reference should be made to "Lewin on Trusts," 9th edition, page 468.

It appears to be law that a trust for sale does not authorise a mortgage (Stroughill *v.* Anstey, 1 De G. M. & G. 645). See further, on this point, Lewin, 9th edition, p. 471, Section 12. But, on the other hand, since the Conveyancing Act, a power to mortgage virtually includes the right of giving a power of sale.

The effect of a recent decision (*re* Frith *v.* Osborne, 3 C. D. 618) is that trustees of a power of sale can under it agree to make a partition.

Notwithstanding the Section says the trustees may sell "*all or any part of the property*," the estate cannot be sold separate from the timber on it, even though the tenant for life may be without impeachment of waste; but such a sale may be sanctioned under 22 & 23 Vict. c. 35, Section 13 (Cholmeley *v.* Paxton, 3 Bing. 207, 5 Bing. 48, 3 Russ. 565, where a sale was set aside after half a century on account of a separation of the timber and the land). The Act mentioned permits a confirmation of such a sale where a *bonâ fide* sale has been made, and by mistake a portion of the purchase money has been paid to the tenant for life or others as the value of the timber or other articles.

The same rule applies to selling the minerals apart from the surface, and it was so decided in Buckley *v.* Howell (29 Beav. 546). But 25 & 26 Vict. c. 108 enables trustees and "*other persons*," i.e. mortgagees (*re* Beaumont's Mortgage Trusts, 12 L. R., Eq. 86; *re* Wilkinson's

Mortgaged Estates, 13 L. R., Eq. 634), with the previous sanction of the Court, to sell the surface separate from the land. That Act is now repealed by Section 51 of the present Act; but, since "trust" is defined as not including the duties incident to an estate conveyed by way of mortgage, it seems open to doubt whether mortgagees could now exercise this power, even with the sanction of the Court. A sale of lands, under The Settled Land Act, 1882, may be made of the land and minerals separately (*see* Settled Land Act, 45 & 46 Vict. c. 38, Section 17 and Section 60).

Where the power of sale is to be exercised "*at the request and by the direction of*" the tenant for life or other person, that request and direction must be obtained, since by Sub-section 2 of this Section the power of sale "shall have effect subject to the terms of the instrument creating the trust or power and to the provisions therein contained."

Trustees for sale of an aliquot part of an estate could, even before the Conveyancing Act, join in a sale of the whole estate (Cavendish *v.* Cavendish, 10 L. R., Ch. App. 319); but the Section now being discussed clears up any doubt on the subject, and gives trustees a wide discretion as to the mode of sale under such circumstances.

Trustees must in selling be guided by the interest of their *cestui que trustent*. The Court will not enforce specific performance where those interests have been neglected or injured. The Court will not enforce a contract which would be a breach of trust (Wood *v.* Richardson, 4 Beav. 176). Trustees must not indefinitely postpone a sale, for this may affect the rights of tenant for life and remaindermen.

If the *cestui que trustent* are all *sui juris* they can agree to extinguish the power of sale (*re* Palmer's Will, 13 L. R., Eq. 408; *re* Herst's Mortgage, 45 C. D. 263; *re* Wadsworth, W. N. 1890, p. 143).

(iv.) *By public auction or private contract.*

As to the considerations which should guide trustees in choosing the mode of sale, the following cases are useful:—*Ex parte* Dunman, 2 Rose, 66; *ex parte* Hurly, 2 D. & C. 631; *ex parte* Ladbrook, 1 Mont. & A. 384; Davey & Durrant, 1 De G. & J. 535.

A trustee cannot delegate the sale (Hardwick *v.* Mynd, 1 Aust. 109).

He must appoint the valuer (Fry *v.* Tapson, 28 C. D. 268), receive the purchase money, and advertise the property if the sale is to be by public auction. The trustee must see that proper arrangements are made for selling, as by advertisements and due notice of the sale.

If the property is sold by auction, the trustees must not permit the

deposit to remain unnecessarily in the hands of the auctioneer whom they have employed (Edmonds *v.* Peake, 7 Beav. 239).

(v.) *Subject to any conditions the trustees think fit.*

This Section should be considered in connection with Section 14 of this Act, which prevents a sale to a *bonâ fide* purchaser being impeached, and see the following cases:—Hobson *v.* Bell, 2 Beav. 17; Wilkins *v.* Fry, 2 Rose, 375; Rede *v.* Oakes, 4 De G. J. & S. 505; Dance *v.* Goldingham, 8 L. R., Ch. App. 902; Dunn *v.* Flood, 25 C. D. 629; Falkner *v.* Equitable Reversionary Society, 4 Drew, 352.

Power to sell subject to depreciatory conditions.

14. (1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4) This Section applies only to sales made after the Twenty-fourth day of December, One thousand eight hundred and eighty-eight.

Section 14, *Sub-section* 1.—By the rules of equity, independently of any enactment, a trustee for sale would, it is apprehended, be justified in resorting to special stipulations if the state of the title and the circumstances of the sale require it, and the stipulations are reasonable and such as a provident owner would employ in the case of

a sale of his own property (Ord *v.* Noel, 5 Mad. 438). However, prior to the enactments after mentioned, it was generally the practice to insert in the instrument containing the trust for or power of sale authority for the trustees to sell under special conditions.

By Lord Cranworth's Act (23 & 24 Vict. c. 145, Section 2) trustees for sale, where the trust instrument was executed after the passing of the Act (the 28th of August, 1860), and such instrument contains no declaration of a contrary intention, were authorised to insert in any conditions of sale or contract such special conditions of sale as to title or evidence of title or otherwise as they might think fit. And by Section 13 of this Act, which replaces Section 35 of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which repealed Lord Cranworth's Act (but not so as to affect the operation of instruments executed before the commencement of the repealing Act), it is provided that trustees for sale, where the instrument creating the trust for or power of sale comes into operation after the 31st of December, 1881, and does not express a contrary intention or make other provision, may sell, or concur with any other person in selling, subject to any such conditions respecting title or evidence of title or other matters as they think fit.

Neither the authority usually contained in instruments creating trusts for sale, nor that conferred by Section 13 of this Act, would, however, justify a trustee in using special conditions which might depreciate the sale and are not rendered actually necessary by the state of the title or the circumstances under which the sale is made (Dance *v.* Goldingham, 8 L. R., Ch. App. 909, 910; and Dunn *v.* Flood, 28 C. D. 591). And a mere desire to save expense in regard to the sale is no sufficient reason for the employment of conditions having a depreciatory effect. Thus a condition limiting the commencement of title to the trust instrument itself, and stipulating that no earlier title should be called for except at the purchaser's expense (Dance *v.* Goldingham, 8 L. R., Ch. App. 902); a condition making an instrument of recent date the root of title where there was nothing on the title rendering such limitation necessary; a condition that every recital or statement in any abstracted document should be deemed conclusive evidence of the fact or matter recited or stated, where apparently there would have been no difficulty in proving the title; and a condition that the sale was made subject to the existing tenancies, restrictive covenants, and other incidents of tenure, and there were no such tenancies, covenants, or incidents of tenure, have

been held to be improper (Dunn *v.* Flood, 25 C. D. 629; 28 *ib.* 586). On the other hand, a condition limiting the title to ten years where the property had been plotted out for building purposes, and was offered for sale in numerous small lots, and to have furnished the earlier title to the purchaser of each lot would have put the estate to very great expense, was held to be proper under the circumstances (Dunn *v.* Flood, 28 C. D. 586). And probably trustees are always justified in the user of conditions depreciatory in a sense, but beneficial on the whole, and such as a prudent owner would resort to: for example, a condition enabling the vendor to rescind if unwilling to comply with the purchaser's requisitions, or a condition casting the expense of the production of documents, or of procuring evidence, upon the purchaser (Falkner *v.* The Equitable Reversionary Society, 4 Drew, 352; Hobson *v.* Bell, 2 Beav. 17).

Courts of Equity apparently in deciding whether relief should be given to the *cestui que trust*, or, where action was taken by the trustee or the purchaser, specific performance of the sale enforced, have hitherto thought it sufficient to inquire whether the conditions were calculated to depreciate the sale, and if there were reasonable and proper ground for their introduction, and have always declined to inquire whether there was an actual depreciation, as being a question impossible for the Court satisfactorily to determine, because the Court cannot know how many people were deterred by the conditions from bidding at or attending the sale (Dance *v.* Goldingham, 8 L. R., Ch. App. 902, 911). Henceforth, however, it will not be sufficient to show that the conditions were of a nature to depreciate the sale, but it must also be shown that the price obtained was not the full value of the property, and that the inadequacy was actually caused through the user of the alleged depreciatory conditions.

Sub-section 2.—Hitherto, where on a sale by trustees depreciatory conditions have been employed, the *cestui que trust* could either have prevented the sale from being completed, or have impeached the purchaser's title after completion (Rede *v.* Oakes, 4 D. J. & S. 513; Dance *v.* Goldingham, 8 L. R., Ch. App. 902). But since the passing of this Act no sale will be impeachable after the conveyance to the purchaser has been executed on the ground that such sale was made under conditions which affected the adequacy of the price obtained, save in the case of collusion between the trustee and the purchaser. However, although where depreciatory conditions have been employed the sale will not be impeachable against a *bonâ fide* purchaser after conveyance,

there is nothing in the Act to debar the *cestui que trust* from making the trustee personally liable for the amount of the inadequacy caused thereby.

Sub-section 3.—As a sale by trustees subject to conditions which, under the circumstances, are unnecessarily depreciatory in their nature is a breach of trust, the purchaser might have declined to complete, and, on the other hand, he could not have enforced the sale against the trustees (Dance *v.* Goldingham, 8 L. R., Ch. App. 911). The purchaser's right to object on the ground of the unnecessary user of depreciatory conditions is now taken away.

Sub-section 4.—This Section is to apply only to sales made after the 24th of December, 1888, which, it is conceived, means only to cases where the contract for sale was entered into after that date.

15. A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of Section 2 of The Vendor and Purchaser Act, 1874. Power to sell under 37 & 38 Vict. c. 78.

Section 15.—This is a re-enactment of Section 3 of The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), that Section being repealed for the purpose of consolidation (*see* Section 51 and Schedule).

Section 2 of The Vendor and Purchaser Act, 1874, is in the following terms :—

"**2.** In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

"First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

"Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

"Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of

documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

"Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

"Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents."

The "contract" referred to in the above-mentioned Section of The Vendor and Purchaser Act, 1874, is a "contract of sale of land" (see Section 1 of that Act).

Married woman as bare trustee may convey.

16. When any freehold or copyhold hereditament is vested in a married woman as a bare trustee she may convey or surrender it as if she were a feme sole.

Section 16.—This is a re-enactment of Section 6 of The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), that Section being repealed by the present Act for the purpose of consolidation (*see* Section 51 and the Schedule).

A married woman being a trustee for sale is, although she have a beneficial interest in the proceeds of sale, a bare trustee within this Section, where the sale is made under an Order of the Court (*in re* Docwra, Docwra *v.* Faith, 29 C. D. 693).—*See* The Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75), Sections 1 and 18.

Various Powers and Liabilities.

Power to authorise receipt of money by banker or solicitor.

17. (1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in Section Fifty-six of The Conveyancing and Law

of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said Section as if the person appointing the solicitor had not been a trustee. 44 & 45 Vict. c. 41.

(2) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(3) Nothing in this Section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

(4) This Section applies only where the money or valuable consideration or property is received after the Twenty-fourth day of December, One thousand eight hundred and eighty-eight.

(5) Nothing in this Section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

Sub-section 1.—This Section replaces Section 2 of The Trustee Act, 1888, which made an important alteration in the law as laid down in the cases of *re* Bellamy and Metropolitan Board of Works (24 C. D. 387), and *re* Flower and Metropolitan Board of Works (27 C. D. 592). They established the rule that unless there is an express power for the purpose, or (to use the expression of Bowen, L. J., in the former case: *see* 24 C. D. p. 404) a moral necessity (as to which see *ex parte* Belchier, Amb. 218) to employ a solicitor to receive purchase money, trustees may not receive trust money through their solicitor, even in the ordinary course of business, though where, in the ordinary course of business, they employ a broker or mercantile agent, they may receive trust money through such broker or mercantile agent (*ex parte* Belchier, *ubi supra*; Speight *v.* Gaunt, 9 App. Ca. 1). By Section 56 of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it was enacted that "where a solicitor produces a deed, having in the body thereof or endorsed thereon a receipt for consideration money or other consideration, the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt."

It has been held in Day *v.* Woolwich Equitable Building Society (40 C. D. 491) that the solicitor must be acting for the person entitled to give the receipt, and must actually "*produce*" the deed with the receipt in it.

This Section of the Conveyancing Act did away in ordinary cases with the necessity of the solicitor producing a written authority expressly authorising him to receive the purchase money or other consideration (Viney *v.* Chaplin, 2 De G. & J. 468, p. 482; and *ex parte* Swinbanks, *in re* Shanks, 11 C. D. 525); but the cases above quoted decided in effect that trustees purchasing were not within the Section, so that where the trustees could not, from special circumstances (*re* Bellamy and Metropolitan Board of Works, 24 C. D. 387: *see per* Cotton, L. J., p. 400), personally receive the money, they had still to give their solicitor a written authorisation so to do. This defect was remedied by Section 2 of The Trustee Act, 1888, now replaced by the 17th Section of this Act, and the production of a deed having in the body thereof or indorsed thereon a receipt

for consideration money or other consideration, the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, will, in all cases, be a sufficient authority to the person liable to pay the solicitor, and will do away also with the necessity for a separate written authority. When a vendor has paid upon the production of such a deed he is exonerated from further liability, even if the solicitor should make away with the money. The trustee, however, who has authorised receipt in this manner, will only be protected where the money or valuable consideration has been in the hands or under the control of the solicitor no longer than would be reasonably necessary to enable the solicitor to pay or transfer it to the trustee. What this period is must, of course, depend on the circumstances of each case.

Where the trustees have a banking account and the consideration is cash, the solicitor should pay it in the same, or, at latest, the following day.

The words of the Section are wide, and comprise not only money, but "*any valuable consideration or property.*"

Sub-section 2. — By this Sub-section a trustee is authorised to appoint a banker or solicitor to receive money due upon a policy of assurance, a power not hitherto possessed unless given expressly by the instrument creating the trust (*see* the cases cited in the note to Sub-section 1, above). This Sub-section differs somewhat in its wording from Sub-section 1, but as it authorises a trustee to appoint a banker or solicitor to be his agent "*to receive and give a discharge* for any money payable to him under a policy of assurance by permitting such banker or solicitor to have the custody of and to produce such policy of assurance with a receipt signed by the trustee, an assurance society paying an agent so appointed would doubtless be discharged and freed from further liability.

Sub-section 3. — It is to be noted that this Section only applies where the money or valuable consideration or property is to be received after the 24th December, 1888, which would, of course, include any cases where the contract for sale was made before that date, but the purchase not completed until after it.

Power to insure building.

18. (1) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal

fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2) This Section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

(3) This Section applies to trusts created either before or after the commencement of this Act, but nothing in this Section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

Before the passing of The Trustee Act, 1888 (Section 7 of which is replaced by this Section), the law as to the duty of executors and trustees to insure against fire property vested in them was to be gathered from the cases of Bailey *v.* Gould (4 Y. & C. 221, and Fry *v.* Fry, 27 Beav. 146), and may be shortly stated as follows:—

(*a*) An executor is not liable for the loss of property by accidental fire, and is not bound either to insure or continue the insurance if one has been effected by the testator. In Bailey *v.* Gould (*ubi supra*) the policy had expired previously to the testator's death. In Fry *v.* Fry (*ubi supra*) the testator as a lessee was bound to insure. The insurance expired on the 25th of March, and the testator died on the 27th, without having paid the premium. The premium was not paid by the executors, and the house was burnt down on the 26th of May. In neither of these cases were the executors (in Fry *v.* Fry they were also trustees) held liable, but a payment made by the executors in the latter case, in part discharge of the testator's covenant to insure to the amount of £300, was allowed, indicating that had the

executors insured they would have been quite justified in so doing, and no exception could have been taken to that course.

(*b*) The position of a trustee is slightly different from that of an executor: he may in his discretion insure the property, but should obtain the consent of the person or persons entitled to the income, before doing so (*see* "Lewin on the Law of Trusts," 9th edition, p. 649).

Thus it will be seen that the law as it stood before The Trustee Act, 1888, placed executors and trustees in a difficult position as regards insuring buildings and property against fire; for, on the one hand, if they omitted to continue or renew a policy of insurance serious loss might be occasioned to the trust estate, while, on the other hand, if they did insure, the beneficiaries interested might raise objections. Moreover, in the case of trustees at least, persons entitled to the income might have to be consulted before the insurance could properly be effected. In the memorandum originally issued with the Bill for The Trustee Act, 1888, the object of the Section now under discussion was said to be to remove a doubt now existing in the profession whether a trustee could insist on having trust property insured at the expense of the tenant for life, but, as the definition in Section 50 includes an executor or administrator as well as a trustee, in the ordinary sense this Section clearly applies to all these persons.

The Section, however, removes all difficulties, leaving it entirely in the discretion of the executor or trustee to insure or not as he thinks fit, without the necessity of consulting anyone interested in the income. The result in the case of a tenant for life will be that the trustee, if he insures, can throw the expense on him. The insurance is not to exceed three-fourths of the full value of the building or property. The premiums are payable out of the income of the property insured or other property subject to the same trusts. "Other insurable property" would include chattels personal, even documents, but in practice the powers of the Section will doubtless be used mainly for the purpose of insuring buildings. Trustees of landed property have already, where the owner is an infant (and if a woman, unmarried), power to insure (*see* Section 42 (2) of The Conveyancing and Law of Property Act, 1881).

Power of trustees to renewable leaseholds to renew

19. (1) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or

and raise money for the purpose.

usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite: Provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this Section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

(2) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

(3) This Section applies to trusts created either before or after the commencement of this Act, but

nothing in this Section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

Section 19, *Sub-section* 1.—Prior to the passing of the Act 23 & 24 Vict. c. 145 (28th August, 1860), in the absence of a direction, either express or implied, in that behalf, a trustee of renewable leaseholds was not bound to renew (O'Ferrall *v.* O'Ferrall, Ll. & G. Rep., *temp.* Plunket, 79). If, however, in such a case the trustee did renew, the renewed lease, although taken by him in his own name or in that of some person acting on his behalf, became subject to the trusts declared of the original term, the trustee having a lien on the estate for the expenses of the renewal, with interest, and a right to be indemnified by the persons beneficially interested against any personal covenants which he entered into with the lessor (Keech *v.* Sandford, Sel., Ch. Ca. 61; Pickering *v.* Vowles, 1 B. C. C. 197; Giddings *v.* Giddings, 3 Russ. 241).

By the 8th Section of 23 & 24 Vict. c. 145 it is provided that "It shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this Section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expenses of renewing the same."

And by the 9th Section of the same Act it is provided that "In case any money shall be required . . . . for renewal of any lease as aforesaid, it shall be lawful for the persons effecting such . . . . renewal to pay the same out of any money which may then be in their

hands in trust for the persons beneficially interested in the lands . . . . comprised in the renewed lease; and if they shall not have in their hands as aforesaid sufficient money for the purposes aforesaid, it shall be lawful for such persons to raise the money required by mortgage of the hereditaments . . . . contained in the renewed lease, or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments . . . . comprised in the renewed lease shall be subject, and for the purpose of effecting such mortgage such persons shall have the same powers of conveying or otherwise assuring as are herein contained with reference to a conveyance on sale; and no mortgagee advancing money upon such mortgage purporting to be made under this power shall be bound to see that such money is wanted for the purposes aforesaid."

The provisions of the above-mentioned Sections of 23 & 24 Vict. c. 145 were restricted to persons acting under a deed, will, codicil, or other instrument executed after the passing of that Act, or under a will or codicil confirmed or revived by a codicil executed after that date (*see* Section 34).

Part I. of 23 & 24 Vict. c. 145, including Sections 8 and 9, was repealed by the 64th Section of The Settled Land Act, 1882 (45 & 46 Vict. c. 38), which, however, declares that the repeal by that Act of any enactment shall not affect any right accrued or obligation incurred before the commencement of that Act (31st December, 1882), nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made before the commencement of that Act.

Section 19 of this Act is, it will be seen, a re-enactment of Section 8 of 23 & 24 Vict. c. 145 (the two Sections being almost identical in their terms), and of part of Section 9 of that Act, and also of Sections 10 and 11 of The Trustee Act, 1888. The new provision, however, is not restricted in its effect to trust instruments executed or made after any particular time, but extends to all trust instruments comprising renewable leaseholds, without reference to date (*see* Sub-section 2 of this Section). The last words of Sub-section 1—"*unless the consent in writing of that person is obtained to the renewal on the part of the trustee*"—were not contained in Section 8 of 23 & 24 Vict. c. 145. Their effect is to give a limited owner a right to assent to a renewal.

Sub-section 2.—It will be observed that although this Sub-section provides for the raising of money required to meet the expenses of

renewal by mortgage of the hereditaments for the time being, subject to the subsisting uses or trusts to which the hereditaments comprised in the renewed lease shall be subject, somewhat after the manner of the 9th Section of 23 & 24 Vict. c. 145, it does not, like that Act, contain an express power to convey the hereditaments to be mortgaged, and cases may therefore arise where a trustee desirous of raising money for the purpose of renewal will find it difficult to give a security effectual at law as well as in equity.

If prior to the Act of 23 & 24 Vict. c. 145 coming into effect the trust instrument directed a renewal, but omitted to point out how the necessary expenses were to be levied, the duty of the trustee, unless the persons beneficially interested consented to advance the money required, would have been to raise the fine and other costs of renewal by a mortgage of the renewed term, that being the course which the Court of Chancery always directed to be adopted when the question was brought before it (Buckeridge *v.* Ingram, 2 Ves. 666; Earl of Shaftesbury *v.* Duke of Marlborough, 2 M. and K. 121; Allen *v.* Backhouse, 2 Ves. and Bea. 72, 79).

A recent case throws considerable light on the question as to how the expenses of renewal should, in the absence of any indication in the settlement or will, be borne as between tenant for life and remaindermen. The case is that of *re* Baring, Jeune *v.* Baring (1893, 1 Ch. 61), which decides that the fine and attendant expenses ought to be distributed among the beneficiaries according to their enjoyment of the property, which enjoyment may properly be ascertained by actuarial valuation. The case is also a decision that the Sections of this Act now under discussion, re-enacting as they do Sections 10 and 11 of The Trustee Act, 1888, do not alter the law as between tenant for life and remaindermen on the point in question, and only deal with the liability of the trustees. This decision practically followed that in Nightingale *v.* Lawson (1 Bro. C. C. 440).

Power of trustee to give receipts.

20. (1) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application

or being answerable for any loss or misapplication thereof.

(2) This Section applies to trusts created either before or after the commencement of this Act.

Section 20.—This is in effect a re-enactment of Section 36 of The Conveyancing and Law of Property Act, 1881, that Section being repealed by the present Act for the purpose of consolidation.

It will be observed that this Section, like the Section of the Conveyancing Act which it replaces, extends not only to "money," but also to "securities or other personal property or effects."

The expression "securities" includes "stocks, funds, and shares" (*see* Section 50, *infra*).

The repealed Section, though retrospective in its operation, so as to include trusts created before the time of its coming into effect, was applicable only to receipts given after that time. And in like manner the present Section, whilst it includes trusts created before as well as trusts created after the commencement of the Act (the 1st day of January, 1894), is nevertheless applicable only to receipts given after such commencement.

The statutory power given by this Section is sufficient to supply the place of the power of giving receipts formerly inserted in instruments creating or conferring trusts for or powers of sale (*in re* Thomas's Settlement, 30 W. R. 244; S. C., W. N. 1882, 7).

The receipt should be under the hands of all the trustees who have consented to act.

If the purchase money is to be paid to trustees directly, the purchaser may require all of them to attend personally to receive it, or, if that is impossible, may insist upon its being paid to their joint account at some bank of which he approves (*in re* C. Flower and the Metropolitan Board of Works, 27 C. D. 592).

Trustees may, however, as we have before seen under the 17th Section of this Act, appoint a solicitor to be their agent to receive and give a discharge for any money or valuable consideration or property receivable under the trust by permitting the solicitor to have the custody of and to produce a deed containing any such receipt as is referred to in Section 56 of The Conveyancing and Law of Property Act, 1881.

The 17th Section of this Act, however, only applies to the appointment of a solicitor as agent, and trustees are not justified in appointing

one of themselves as agent to receive purchase money on behalf of all (*see in re* C. Flower and the Metropolitan Board of Works, *ut supra*).

The 23rd Section of 22 & 23 Vict. c. 35 is apparently still unrepealed, though it is practically superseded as to trustees by this Section, as it had in fact already been by the repealed 36th Section of The Conveyancing and Law of Property Act, 1881.

Power for executors and trustees to compound, &c.

21. (1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3) This Section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

(4) This Section applies to executorships, ad-

ministratorships, and trusts constituted or created either before or after the commencement of this Act.

Section 21.—This Section in effect re-enacts the 37th Section of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), repealed by the present Act, and extends it so as to include administrators.

Sub-section 1 relates exclusively to the nature of the evidence on which an executor or administrator may act with regard to debts alleged to be owing from and claims made upon the estate of his testator or intestate, as the case may be.

Sub-section 2.—Executors or administrators are considered in law as one person, and any one of them may by his act bind the rest (Smith *v.* Everett, 27 Beav. 446).

Where there are several trustees appointed, all who accept the office are, in the view of Courts of Equity, acting trustees; and if any one of them, having accepted, declines or becomes incapable of joining in the execution of the trust, it is not competent for the others to act without him. There is no distinction known between an active and a passive trustee, and the rules of equity do not, save perhaps in the case of public trusts, allow some of several trustees, even though they constitute the majority, to bind the rest (*re* Congregational Church, Smethwick, W. N. 1866, p. 196; Luke *v.* South Kensington Hotel Company, 7 Ch. D. 789, 11 *ib.* 121). It is conceived, therefore, that this Sub-section does not, where there are several trustees, enable some of them to exercise the powers conferred by it, without the concurrence of the others, but that the joinder of all will still be necessary.

"Two or more trustees, acting together, may."—It is submitted that these words must be read as equivalent to "when there are two or more trustees (*i.e.* several trustees), they, acting together, may."

"A sole acting trustee may."—These words, it is submitted, must be read as equivalent to "where a sole trustee is acting in the execution of the trusts, he may"; for, as has already been pointed out, the law knows nothing of an acting trustee, save in the sense of an accepting trustee.

"Where by the instrument, if any, creating the trust a sole trustee is authorised."—Where the trusts and powers of the trust instrument are so worded that they vest in a sole trustee for the time being, no

express authority in the trust instrument to execute those trusts and powers will, it is apprehended, be necessary to enable the trustees to exercise the powers conferred by this Sub-section.

The power to compromise applies as much to the claim of a legatee as to debts owing to or from the testator's estate (*in re* Warren, Weedon *v.* Reading, 32 W. R. 916).

The executor of a person who was a partner in a firm, the property of which included real estate, might, it would seem, enter into a compromise with respect to such real estate (West of England and South Wales District Bank *v.* Murch, 23 C. D. 138).

The Sub-section does not authorise executors to enter into a compromise with respect to real estate in which they have been given no interest by the testator, or with respect to the validity of the will or the testamentary power of the testator (Abdallah *v.* Rickards, 4 Times Reports, 622, S. C. 32, S. J. 525).

Notwithstanding the general terms of this Sub-section, a compromise by executors of a debt due from one of themselves would in all probability not be upheld by the Court unless it were clear that such a compromise would benefit the estate (De Cordova *v.* De Cordova, 4 App. Ca. 692).

It is apprehended that the question to be considered under this Section is whether the trustees or personal representatives have acted in good faith, and that it is not for the trustee or personal representative to show that a particular transaction falling within the Section was a proper one, but for the *cestui que trust* impeaching it to show its impropriety (*in re* Brogden, Billing *v.* Brogden, 38 C. D. 546, S. C. 47, L. T. 61, 64).

The Section applies to all executorships, administratorships, and trusts, whether constituted or created before or after the time of its commencement; but it only extends to transactions under its powers which take place after that time. The repealed Section, which is very similar, except that it does not extend to administrators, was, however, it must be borne in mind, in force from the 31st day of December, 1881, down to the commencement of this Act. And prior to the passing of the Conveyancing and Law of Property Act, executors had, under 23 & 24 Vict. c. 145, Section 30, powers similar to those conferredon them by this Section.

Independently of any statutory authority, trustees might, where it was for the benefit of the trust estate, release or compound a debt or allow a reasonable time for its payment (Blue *v.* Marshall, 3 P. Wms. 381, and Forshaw *v.* Higginson, 8 D. G. M. & G. 827).

Powers of two or more trustees.

22. (1) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(2) This Section applies only to trusts constituted after or created by instruments coming into operation after the Thirty-first day of December, One thousand eight hundred and eighty-one.

Section 22.—This Section is a re-enactment of Section 38 of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), so far as that Section, which is repealed by the present Act (*see* Schedule), relates to trustees.

Independently of statutory enactment, it would seem that where there are several trustees the office of trustee is a joint one, and when one of the trustees dies survives to the others, and the trust, being annexed to the office, survives with it (Co. Litt. 113*a*; Lane *v.* Debenham, 11 Hare, 188, 192).

So where a power is conferred on persons, not in their individual capacity, but in their character of trustees, such power will belong to the trustees for the time being (Byam *v.* Byam, 19 Beav. 58, 66).

And where the trust estate passes by survivorship to the surviving trustees, all powers constituting an essential part of the trust are deemed to be annexed to the trust estate and to pass with it (Lane *v.* Debenham, *supra*; Watson *v.* Pearson, 2 Ex. R. 581, 594).

The survivorship of a trust or power, whether annexed to the office of trustee or to the trust estate, will not, it is apprehended, be defeated because the instrument creating the trust contains a power of appointing new trustees (Warburton *v.* Sandys, 14 Sim. 622).

"Given to or vested in two or more trustees jointly."—It is conceived that these words mean given to or vested in the trustees in their capacity of trustees, and not as individuals. And if this view be a correct one, a bare power—that is, a power given to strangers to the estate—and a power or authority given to several persons nominatim, and therefore in their individual capacity, are not within the Act, and will not survive.

The repealed Section of The Conveyancing Act, 1881, applied as

well to powers given to executors as to powers given to trustees, whilst the re-enactment extends in terms only to powers or trusts given to or vested in trustees. By Section 50 of the present Act it is provided that, unless the context otherwise requires, the expressions "trust" and "trustee" shall include "the duties incident to the office of personal representative of a deceased person." However, notwithstanding these somewhat obscure words of definition, it is conceived that the present Section does not extend to the case of a bare power given to executors over a testator's real estate, although such power or authority be given to the executors in their official capacity and not personally; for such a power is clearly not a duty incident to the office of personal representative. And it is, therefore, submitted that the law with regard to powers or authorities given to executors over real estate is now on the same footing as it was before the repealed Section came into operation.

The office of executor or administrator survives (Adams *v.* Buckland, 2 Vern. 514).

It was, before the repealed Section came into operation, doubted whether where a mere power is given by a testator to his executors to sell his real estate, such power could be exercised by a sole surviving executor, and that doubt is apparently revived by the repeal of Section 38 of The Conveyancing Act, 1881, without a re-enactment in terms extending to executors. It is, however, submitted that where such a power is given to executors in their official capacity, it is annexed to the office and will survive with it, and can therefore be exercised by a single survivor (*see* Mr. Hargraves's Note to Co. Litt. 113*a*, and Sugden on Powers, 8th edition, pp. 126, 127, 128; and *see* Crawford *v.* Forshaw, 1891, 2 Ch. 261, 265, 267).

Where a power is given to certain persons by name, and they are also appointed executors, it is the duty of the Court to ascertain whether the power is given to the executors in that character, or in an individual and personal capacity (Brassey *v.* Chalmers, 16 Beav. 223; and Crawford *v.* Forshaw, 1891, 2 Ch. 261).

And where a power is given to several executors in their official capacity, and one renounces, those who prove may exercise the power (Crawford *v.* Forshaw, *supra*).

If a power is annexed to the office of a sole executor, and he renounces, the power is extinguished (Attorney-General *v.* Fletcher, 5 L. J., N. S., Ch. 75).

By the 79th Section of The Probate Act, 1857 (20 & 21 Vict. c. 77),

it is provided that "where any person after the commencement of this Act renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may without any further renunciation go, devolve, and be committed in like manner as if such person had not been appointed executor."

Exoneration of trustees in respect of certain powers of attorney.

23. A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

Provided that nothing in this Section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

Section 23.—This Section is in effect a re-enactment of Section 26 of 22 & 23 Vict. c. 35, so far as that Section, which is repealed by the present Act (*see* Schedule), extended to trustees.

The Section, it is apprehended, does little more than express the rule of equity, for the Court would probably be slow to fix with liability a trustee who acted under a power of attorney in good faith and without knowledge of the death of the principal.

A power of attorney may be revoked either by the express declaration of the principal, or by implication.

If a power of attorney is given by deed, it should be revoked by deed, though in strictness perhaps this is not absolutely essential, since the grantee of a power of attorney is bound to follow the wishes and directions of the grantor (The Margaret Mitchell, Swabey's Admiralty Rep. 382).

Where a power is executed for valuable consideration it cannot be expressly revoked whilst the consideration holds (Bromley *v.* Holland, 7 Ves. 28).

A power of attorney will be impliedly revoked—

(1) Where the principal ceases to have power over the subject-matter of the power;
(2) By the insanity of the principal;
(3) By the principal becoming bankrupt;
(4) By the death of the principal.

As to the effect of supervening insanity of the principal see Jarman's Bythewood, vol. 8, pp. 36, 37. And as to payments made or acts done in pursuance of a power of attorney without notice of the principal having become lunatic or of unsound mind see Section 47 of The Conveyancing and Law of Property Act, 1881, after referred to.

As to the effect of the bankruptcy of the principal upon a power of attorney see Markwick *v.* Hardingham (15 C. D. 339) and Elliott *v.* Turquand (7 App. Ca. 79).

Where the power forms the security for a debt, or was executed for valuable consideration, it will not be revoked by the principal's bankruptcy (Alley *v.* Hotson, 4 Campb. 325).

At common law a power of attorney, even though coupled with an interest, was revoked by the principal's death (Watson *v.* King, 4 Campb. 272); but the contrary is said to be the rule of equity. However, in the case of Spooner *v.* Sandilands (1 Y. & C. C. C. 390), in which the point came directly before the Court, it was apparently held that the power was revoked both at law and in equity by the principal's death, but that the letter of attorney operated not only to confer a power, but also as a charge.

In the case of Kiddill *v.* Farnell (3 Sm. & G. 428) a clause in a power of attorney, in the usual form issued by the Bank of England, for the transfer of stock, to make it good notwithstanding the death of the grantor before transfer, was held effectual.

The 26th Section of 22 & 23 Vict. c. 35 extended to executors and administrators as well as to trustees, whilst this Section extends only to trustees. However, by Section 47 of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), a general protection is given to every person making or doing any payment or act in good faith in pursuance of a power of attorney, notwithstanding that before the payment or act the donor of the power had died, or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of

death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making the same.

And now, under the provisions contained in the 8th and 9th Sections of The Conveyancing and Law of Property Act, 1882, a power of attorney may, by the instrument creating it, be made absolutely irrevocable when given for valuable consideration, or irrevocable for a fixed time not exceeding one year, whether given for valuable consideration or not.

Implied indemnity of trustees.

24. A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.

Section 24.—This Section is in effect a re-enactment of Section 31 of 22 & 23 Vict. c. 35, that Section being repealed by the present Act (*see* Section 51 and Schedule).

This Section, like the repealed Section, only expresses the rule of Courts of Equity (*re* Brier, Brier *v.* Evison, 26 C. D. 238, 243).

At law, where trustees join in a receipt, *primâ facie* all are to be considered as having received the money; but the rule of Courts of Equity is that the mere circumstance of a trustee joining in a receipt for the sake of conformity, without receiving the moneys to which such receipt relates, is not sufficient to charge him in the event of a misapplication by the trustee who actually receives (Brice *v.* Stokes, 11 Ves. 319 324;

re Fryer, Martindale *v.* Picquot, 3 K. and J. 317). The trustee, however, to exonerate himself, must show that the money acknowledged to have been received by all was, in fact, received by the other trustees, and that he joined only for conformity (Brice *v.* Stokes, *supra*).

Although a trustee may not be chargeable simply by reason of his allowing his co-trustee to receive moneys of the trust, he will become liable for misapplication if in breach of his duty he allow his co-trustee to retain such moneys for a longer period than the actual circumstances require (Brice *v.* Stokes, *supra;* Lincoln *v.* Wright, 4 Beav. 427), or fail to see that they are properly applied for the purposes of the trust (Thompson *v.* Finch, 22 Beav. 316).

Trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust as, according to the usual mode of conducting business of a like nature, persons acting with usual care and prudence on their own account would ordinarily conduct through mercantile agents; and when according to the usual and regular course of such business moneys receivable or payable ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees though the moneys are trust moneys (*ex parte* Belchier, Amb. 218; Speight *v.* Gaunt, 9 App. Ca. 1, 4).

A trustee is justified in depositing trust moneys for temporary purposes in the hands of bankers of good credit (Rowth *v.* Howell, 3 Ves. 565; Wilks *v.* Groom, 3 Dr. 584, 592; Swinfen *v.* Swinfen, No. 5, 29 Beav. 211); but the moneys should be paid in to the separate account of the trust, and not mixed with the trustee's own moneys (*ex parte* Kingston, *in re* Gross, 6 L. R., Ch. App. 632).

Where an administrator deposited moneys, part of his intestate's estate, with bankers on a current account separate from his own account, it was held that the fact of the bankers allowing half-yearly interest on the moneys for the time being standing on such current account did not affect the position of the administrator (*re* Marcon's Estate, Finch *v.* Marcon, W. N. 1871, p. 148).

The Section, however, does not extend its indemnity to cases of wilful default, and a trustee is therefore still liable, in the event of the failure of the bankers, if he allows money to lie in the bankers' hands when he ought to have invested it (Moyle *v.* Moyle, 2 Russ. & My. 710), or if he leave it in the hands of the bankers when he ought to have paid it over to other parties, as, for instance, to new trustees duly appointed (Lunham *v.* Blundell, 4 Jur., N. S. 3), or if he lend moneys to

the bankers by way of loan on their personal security (Darke *v.* Martyn, 1 Beav. 525). And should he keep a larger balance at the bankers' than is reasonably necessary for the purposes of the trust, he would in the event of the bankers failing be liable to make good what the Court should consider to be the excess over the sum which he ought to have had in the bank (Astbury *v.* Beasley, W. N. 1869, p. 96).

A trustee investing trust funds is justified in employing a broker to procure securities authorised by the trust, and in paying the purchase money to the broker if he follow the usual and regular course of business adopted by ordinarily prudent men in making such investments (Speight *v.* Gaunt, *supra*).

A trustee is also justified in employing an agent to collect debts due to the trust estate (*re* Brier, Brier *v.* Evison, *supra*).

As to the right of a trustee to employ a solicitor, auctioneer, or stockbroker see *re* Blundell, Blundell *v.* Blundell (40 C. D. 370, 376).

The rule that trustees acting according to the ordinary course of business, and employing agents as prudent men of business would do on their own behalf, are not liable for the default of the agent so employed, is subject to the limitation that the agent must not be employed out of the ordinary scope of his business (Fry *v.* Tapson, 28 C. D. 268).

A trustee who selects as his agents persons properly qualified cannot be made responsible for their intelligence or their honesty; but he cannot entrust them with any duties which they may be willing to undertake, or pay them any remuneration which they may demand, and he is bound to exercise his discretion in the matter (*re* Weall, Andrews *v.* Weall, 42 C. D. 674).

In the case of Bostock *v.* Floyer (1 L. R., Eq. 26) a trustee was held liable for the loss through the fraudulent conduct of his solicitor of trust moneys which he had handed to his solicitor for investment, the reason of the decision apparently being that it was not for a specific investment, and that it is not the ordinary course of business for a trustee to place money in the hands of a solicitor to invest.

As to the duties of a trustee when investing trust moneys see the notes to Sections 1 and 8, *supra*.

"Money and securities actually received by him."—The expression "securities" includes stocks, funds, and shares (*see* Section 50, *infra*).

"And may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts

or powers."—Independently of statutory enactment, a trustee is, by the rules of equity, entitled to reimburse himself out of the trust estate all costs, charges, and expenses properly incurred by him in the administration of the trust; for, in the words of Lord Cottenham, in the case of the Feoffees of Heriot's Hospital *v.* Ross (12 Cl. & Fin. 507, p. 515), the first object of a trust is to indemnify those who administer it against any costs properly incurred in its administration.

And a trustee is entitled to be indemnified by his *cestui que trust* personally against costs and expenses properly incurred (*ex parte* Chippendale, *re* German Mining Company, 4 D. G. M. & G. 19, p. 54).

And where a trustee has incurred a liability in performance of his duty, it seems that the Court would compel his *cestui que trust* to give him an indemnity, although no loss had actually accrued (Phéné *v.* Gillan, 5 Hare, 1, 12, 13).

A trustee is entitled to his expenses notwithstanding that an annuity is given to him under the trust instrument as a recompense for the care and trouble which will attend the due execution of his office (Wilkinson *v.* Wilkinson, 2 S. & S. 237).

Trustees should keep careful account of their disbursements on account of the trust.

As to the right of trustees to reimbursement generally see "Lewin on Trusts," 9th edition, Cap. xxiv., Section 2, where the subject is very fully treated.

PART III.

POWERS OF THE COURT.

Appointment of New Trustees and Vesting Orders.

Power of the Court to appoint new trustees.

25. (1) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt.

(2) An order under this Section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(3) Nothing in this Section shall give power to appoint an executor or administrator.

Section 25.—This part of the Act deals with the important powers vested in the Court of appointing new trustees on summons, and demands a careful and exhaustive discussion, as this and the following Sections replace the hitherto unrepealed Sections of The Trustee Act, 1850.

Taking, then, each part of the Section in succession:—The power is exerciseable by the Court "whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable" to act without the assistance of the Court.

Where there is a valid existing power of appointing new trustees, and a person willing to exercise it, the Court will not exercise the power conferred by this Section (*re* Sutton, W. N. 1885, 122; *re* Gibbon's Trusts, W. N. 1882, 12). Hence it must be borne in mind that this power of the Court only comes into play when there is no person who will exercise the power. Nor will the Court intervene and appoint where there is a valid power of appointment, merely upon the suggestion that it will be improperly exercised (*re* Hodson's Trust, 9 Hare, 118). But if the trustees are resident out of the jurisdiction, the Court will appoint (*re* Humphrey's Estate, 1 Jur., N. S. 921).

Moreover, contrary to many decided cases, it is now clear that the Court will not, where new trustees have already been appointed out of Court under a valid power, reappoint them for the purpose of making a vesting order (*re* Vicat, 33 C. D. 103; *re* Dewhirst's Trusts, 33 C. D. 416; and *re* Gardiner's Trusts, 33 C. D. 590); though it may be proper to, and the Court will, where there is any reasonable question whether trustees appointed under a power have been duly appointed, reappoint them (*see* Cotton, L. J., *re* Vicat, *ubi supra*).

The Court will not, on any application for the appointment of new trustees, enter into the question of the validity of the instrument creating the trust (*re* Matthews, 26 Beav. 463).

The following persons have been held to be trustees, in addition, of course, to the cases where they are obviously so:—

(*a*) Trustees of a composition deed; of a deed registered under The Bankruptcy Act, 1861; a bankrupt's assignee (*re* Price, 6 L. R., Eq. 460; *re* Bache, W. N. 1868, 223; *re* Donisthorpe, 10 L. R., Ch. 55; *re* Joyce, 2 L. R., Eq. 576).

(*b*) A vendor of land where the title is clear (*re* Lowry, 15 L. R., Eq. 78; *re* Russell, 12 Jur., N. S. 224), or the contract has been executed (*re* Cuming, 5 L. R., Ch. 72), or been the subject of an award (*re* Taylor, W. N. 1865, 2); but if the title is not clear it must be established in a suit (*re* Carpenter, Kay, 418; *re* Weeding, 4 Jur., N. S. 707; *re* Faulder, W. N. 1866, 83). A vendor of copyholds who has covenanted to surrender, and has received the price (*re* Collingwood, 6 W. R. 536; *re* Cuming, 5 L. R., Ch. 72). But a vendor who has not received the price, and who dies, would not be a trustee for the purposes of this Act, in accordance

with decisions on the repealed Trustee Act of 1850 (*re* Colling 32 C. D. 333).

(*c*) A vendor or constructive trustee of stocks or shares, or a legacy (*re* Angelo, 5 D. & S. 278; *re* Davis, 12 Eq. 214).

The cases where the Court considers it expedient are not absolutely definable, but may be grouped, so far as the decided cases go, under the following heads:—

(*a*) Infancy.—Where a trustee is an infant the Court will appoint another trustee in the infant's place, but without prejudice to any application by the infant on coming of age to be restored to the trusteeship (*re* Shelmerdine, 33 L. J., Ch. 474; see also *re* Porter's Trust, 2 Jur., N. S. 349; *re* Gartside's Estate, 1 W. R. 196).

(*b*) The Court has also considered it expedient where all the trustees have died in the testator's lifetime, and there are therefore no trustees, or where there was no representative of a last surviving trustee, or difficulty in obtaining administration (*re* Smirthwaite's Trusts, 11 L. R., Eq. 251; *re* Moore, McAlpine *v.* Moore, 21 C. D. 778; *re* Williams's Trusts, 36 C. D. 231; *re* Matthews, 26 Beav. 463; Davis *v.* Chanter, 4 Jur., N. S. 272; *re* Davis's Trusts, 12 L. R., Eq. 214).

(*c*) In cases where there is a doubt whether the power of appointment applies, the Court will appoint new trustees (*re* Woodgate's Settlement, 5 W. R. 448; *re* Armstrong's Settlement, *ib.*).

(*d*) Where a trustee is bankrupt the Court can, if it thinks fit, remove him, and appoint another in his place, whether he consents or not (*see* last clause of Sub-section 1, and also Coombes *v.* Brookes, 12 L. R., Eq. 61; *re* Adams's Trust, 12 C. D. 634; *re* Foster, 55 L. T. R., N. S. 479; and *re* Mace's Trusts, W. N. 1887, p. 232).

(*e*) Where a trustee is a lunatic the Court can appoint a new trustee, and the application should be entitled in Chancery alone, unless a vesting order is desired, in which case it must be entitled "In Lunacy" as well (*re* Vickers's Trusts, 3 C. D. 112; *re* Mason, 10 L. R., Ch. 273); but if the lunatic trustee is out of the jurisdiction, the application need only be entitled "In the Chancery Division" (*re* Gardner's Trusts, 10 C. D. 29).

(*f*) Where a trustee is convicted of felony (see last clause of Sub-section 1).

(*g*) Where a trustee has absconded and cannot be discovered.

(*h*) Where a trustee has gone to reside permanently abroad (*re* Bignold's Settlement Trusts, 7 L. R., Ch. 223).

Under the powers of this Section the Court can appoint a new trustee or new trustees either—

(*a*) In substitution for;

(*b*) In addition to any existing trustee or trustees; or

(*c*) Although there is no existing trustee.

The Court will not necessarily limit itself to the original number of trustees, but, whatever the original number, it will not reduce it unless an administration action is pending, or the trust property is immediately divisible, or about to be paid into Court (*re* Gardiner's Trusts, 33 C. D. 590; Davies *v.* Hodgson, 32 C. D. 225; *re* Lamb's Trusts, 28 C. D. 77; and *see re* Stokes's Trusts, 13 L. R., Eq. 333; *re* Harford's Trusts, 13 C. D. 135; *re* Tatham's Trusts, W. N. 1877, 259; *re* Aston, 23 C. D. 217; *re* Martyn, 26 C. D. 745).

If there were originally one trustee, one new one may be appointed (*re* Reynault, 16 Jur. 233), though in this case the trust was coming to an end. The Court has appointed two instead of one (Tunstall's Will, 4 De G. M. & Sm. 421). If there were two old trustees, the Court, as stated above, will never appoint less than two new ones, and has sometimes added to that number, as in *re* Boycott (5 W. R. 15), where it appointed two in addition to the original two.

In the case of a charity where there were ten trustees, the Court on appointing that number directed that when they became reduced to three they should apply in chambers for an appointment of others to fill up the number (*re* Bergholt, 2 Eq. Rep. 90).

As to the persons the Court appoints as trustees. The following persons are not eligible for appointment by the Court as trustees:—

(*a*) Persons resident out of the jurisdiction (*re* Guibert, 16 Jur. 852; Curtis's Trust, 5 L. R., Eq. 422); but under special circumstances, as where the bulk of the property is abroad, the Court will appoint such persons, and can, and does, allow remuneration for their services out of the trust property (*re* Freeman's Settlement Trusts, 37 C. D. 148).

(*b*) Aliens.—The Court objects to appoint aliens, because they

are, as a rule, out of the jurisdiction; but where the *cestui que trusts* were living abroad, and English trustees could not be found, the Court has appointed aliens (*re* Hill's Trust, W. N. 1874, 228). Where, by inadvertence, an alien was appointed, the Court has, subsequently, upon a rehearing, discharged the order (*re* Giraud, 32 Beav. 385).

(*c*) Any of the *cestui que trusts*, unless it can be avoided (*ex parte* Clutton, 17 Jur. 988; *re* Clissold, 10 L. J., N. S. 642; *ex parte* Conybeare's Settlement, 1 W. R. 458). The husband of a *cestui que trust* can be appointed, especially if he be one of three trustees (*re* Hattatt's Trusts, W. N. 1870, 14; *re* Burgess's Trusts, W. N. 1877, 87). One of the firm of solicitors acting for the petitioners has been appointed in one case (*re* Brentwall's Trust, W. N. 1872, 77), but as a rule the solicitor acting for a party will not be appointed.

(*d*) A Trust Corporation.—The Court has refused to appoint such a company a trustee, but has appointed certain individuals nominated by it (*re* Brogden, Billing *v.* Brogden, W. N. 1888, p. 238).

Generally, the Court can appoint separate sets of trustees for distinct trusts under this Act (Cotterill's Trusts, W. N. 1869, 183; Cunard's Trusts, 27 W. R. 52; Moss's Trust, 37 C. D. 513; and see notes to Section 10, Sub-section 2 (*b*) of this Act).

An affidavit of fitness of the trustees is always required by the Court, and should show something as to the position of the proposed trustees in respect of their pecuniary means (*re* Castle, Sterry's Trusts, W. N. 1888, 179). The description of deponent of such an affidavit as a "gentleman" is insufficient, and the costs of such an affidavit will be disallowed (*re* Horwood, W. N. 1886, 139; *re* Orde, 24 C. D. 271; but see Dodsworth, Spence *v.* Dodsworth, 1891, 1 Ch. 657).

The consent of a new trustee to act is now to be evidenced by a written consent, signed by him, and verified by the signature of his solicitor (R. S. C. 1883, Or. 38, R. 19*a*). This rule does not apply to lunacy proceedings (*re* Wilson, 31 C. D. 522); but it does apply to proceedings entitled "In the Chancery Division," as well as "In Lunacy" (*re* Hume, 35 C. D. 457); but the Rules in Lunacy, 1890, R. 92, have now assimilated the practice.

The application for the appointment of new trustees is made by summons in chambers under R. S. C. 1889, 1 (R. S. C. 1883, Or. 55,

R. 13*a*). Where, however, a vesting order alone is desired, the trustees having been appointed out of Court, the rule in question does not apply, and the application must be by petition (*re* Peach, 33 Sol. J. 575; and *re* Trubee, 36 Sol. J. 503).

Order 55, Rule 13*a*, of the Rules of the Supreme Court is in these terms:—

"In all cases in which the Court has jurisdiction to appoint new trustees upon petition, an application may be made to a judge in chambers by summons, and thereupon new trustees may be appointed, and by the same or by any subsequent orders to be made on the same or any other summons for the purpose such vesting and other consequential orders may be made as the Court has jurisdiction to make upon petition for the appointment of new trustees. Every such summons shall be intituled in the same manner as the petition seeking the like relief ought to have been, and shall be served on the same persons upon whom the petition ought to have been served."

As to who can make the application see Section 36 of this Act and notes thereto.

A summons under this order will now have to be intituled as follows:—

[*Reference to Record.*]

IN THE HIGH COURT OF JUSTICE,

CHANCERY DIVISION.

Mr. JUSTICE [ ].

In the Matter of the Trusts of [*the Will of A. B. deceased, dated the day , or an Indenture of Settlement, dated, &c., and made between, &c.*, or as the case may be]:

And in the Matter of The Trustee Act, 1893, intituled An Act to Consolidate Enactments Relating to Trustees.

And the summons should have a note appended in these terms:—

NOTE.—*The Order to be made on this Summons is sought under Sections* [ ] *of The Trustee Act, 1893.*

Sub-section 2.—The effect of this is simply that the trustees who cease to be trustees, when new ones are appointed by the Court, are not liable for anything taking place after their retirement.

Sub-section 3.—An executor can only be appointed by a testator himself; an administrator by the Court of Probate (*see re* Willey, W. N. 1890, 1).

Vesting orders as to land.

26. In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed a new trustee; and

(ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—

(*a*) is an infant, or

(*b*) is out of the jurisdiction of the High Court, or

(*c*) cannot be found; and

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and

(v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the

right for twenty-eight days after the date of the requirement; Vesting orders as to land.

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

Provided that—

(*a*) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

(*b*) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

Section 26.—This Section is confined to cases of trusteeship, and does not apply to the case of an infant mortgagee, as Section 7 of The Trustee Act, 1850, did: this is, however, met by Section 28, *infra*. The Definition Section (Section 50) clearly excludes a mortgagee. In these instances, and subject to the provisions above mentioned, the Court can, on the appointment of new trustees, vest the land, or release the contingent right thereto.

This Section, along with Sections 28 and 32, replaces Sections 7, 8, 9, 10, 11, 12, 13, 14, 15, and 34 of The Trustee Act, 1850, so far as they affect trustees, and Section 2 of The Trustee Extension Act, 1852.

i. Under the former Acts, and it is apprehended under this Act, the Court can, and will, make a vesting order when appointing a new trustee, even though there is no incapacity in the person possessed of the legal estate to convey it to the new trustee (*re* Manning's Trust

Kay, App. xxviii.), and if the new trustees are appointed in a suit a vesting order may be made subsequently (*re* Hughes's Settlement, 2 Hem. & Miller, 695).

Where the evidence required on the appointment of a new trustee is not produced on the making of the vesting order, the latter will be post-dated (*re* Havelock's Trust, 11 Jur., N. S. 906).

It is clear that this Section includes the case of leaseholds, which are within the definition of "lands." Indeed it has been held that Section 34, which is replaced by this Section, applied to leaseholds. The assent of the landlord to the vesting order is not needed unless there is a restriction against alienation (*see re* Matthews's Settlement, 2 W. R. 85; *re* Driver's Settlement, 19 L. R., Eq. 352; *re* Dalgleish's Settlement, 4 C. D. 143; and *re* Rathbone, 2 C. D. 483, which overrules *re* Dalgleish's Settlement, 1 C. D. 46). An order can be made even where the land has escheated, if the Crown assents to the vesting order (*re* Martinez's Trust, W. N. 1870, p. 70).

ii. Under this Sub-section the Court can make a vesting order where the trustee is seised, possessed, or entitled to any land or a contingent right therein, either—

(1) Solely.

(2) Jointly with any other person.

(1) "Solely" seised.

A coparcener who has no beneficial interest, and holds in trust for the other coparcener, is solely seised (McMurray *v.* Spicer, 5 L. R., Eq. 527); but in *re* Greenwood's Trusts (27 C. D. 359) it was held that the words "seised jointly" in Section 10 of The Trustee Act, 1850 (which is replaced by the Section now under consideration), are not strictly limited to a legal joint tenancy, but are used in the widest sense, and include a case of land vested in coparceners, one of whom is out of the jurisdiction (*re* Greenwood, 27 C. D. 359). Where trustees of realty have disclaimed, the heir is a trustee within the Act, and so, too, where the trustees have all died in the testator's lifetime (Wilks *v.* Groom, 6 De G. M. & G. 205; *re* Gill, 1 Set., 4th edition, 520).

Where a vendor dies after a contract to sell has been entered into, but before conveyance, the sale having, in equity, converted the property *into personalty*, the heir is a trustee within this Section (*re* Badcock, 2 W. R. 386). In the case of a sale of realty which has not been converted, the infant heir is not a trustee until a decree of a Court has been made to that effect, or unless the purchase-money has been paid

to the vendor in his lifetime (*re* Cuming, 5 L. R., Ch. 72; and see note to Section 50, *infra*).

(2) "Jointly" seised.

Joint mortgagees are not within this Section as trustees (*re* Walker's Mortgage Trusts, 3 C. D. 209; and see Section 50).

But the co-heirs of a mortgagee are trustees within the Act; and if one be in the jurisdiction and one out, the latter is a trustee for the persons entitled to the mortgage moneys (*re* Templer's Trust, 4 N. R. 494; see also *re* Hughes's Settlement, 2 Hem. & Miller, 695).

(*a*) Is an infant.

In the absence of any definition in this Act (Section 50) excluding an infant of unsound mind from the term "an infant," it seems that the case of a trustee who is an infant and of unsound mind falls under the jurisdiction herein given to the Court of Chancery.

In Powell *v.* Matthews (1 Jur., N. S. 973) it was held that a vesting order under the similar Section will, if consented to by the protector of the settlement, bar all estates in remainder, and not pass a base fee only under The Fines and Recoveries Abolition Act, 1834.

(*b*) Is out of the jurisdiction of the High Court.

Mere temporary absence is not sufficient to enable the Court to act; as where the captain of a merchant vessel was away on a voyage (Hutchins on Stephens, 5 Sim. 499). Even where a trustee has appeared by counsel he may be treated as out of the jurisdiction (Stillwell *v.* Ashley, not reported, 1 Seton, 4th edition, 520).

If the trustee out of the jurisdiction is of unsound mind, this Section applies, and the application need only be made in Chancery, not in Lunacy (*re* Gardner's Trustees, 10 C. D. 29).

(*c*) Cannot be found.

A mortgagor who had deposited deeds by way of equitable mortgage, and against whom a decree of foreclosure had been made, and who could not be found, is a case falling under this Section (Lechmere *v.* Clamp, 30 Beav. 218, 31 Beav. 578). Another instance will be found in *re* Walker's Mortgage Trusts (3 C. D. 209).

iii. There is no presumption as to the time when one of two persons died, if dying in the same accident, shipwreck, or battle (Wing & Angrave, 8 H. L. C. 183, 198; see also *re* Phéné's Trust, 5 L. R., Ch. 139; *re* Corbishley's Trusts, 14 C. D. 846).

iv. A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him is presumed to be dead, unless the circumstances of the

case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it (*re* Phéné's Trust, 5 L. R., Ch. 139).

v. The Court can make a vesting order under this Sub-section—

(*a*) Where there is no heir or personal representative to a trustee; or

(*b*) Where it is uncertain who is the heir or personal representative.

This Sub-section replaces Sections 15 and 34 of The Trustee Act, 1850, and does away with the difficulty that it was only when new trustees were appointed under Section 34 that such an order could be made in relation to leaseholds. "Land" as defined in the present Act clearly covers the case of leaseholds for years, and the Sub-section now under discussion goes further than Section 15 of the old Act, as it includes the case of a trustee having no personal representatives, which obviously contemplates personalty. The difficulty as to leaseholds was usually surmounted by appointing new trustees under Section 34, and then vesting the leaseholds. *Re* Mundel's Trust (8 W. R. 683) and *re* Harvey (Seton, vol. i. p. 520) are therefore no longer law, and the expedient usually resorted to and sanctioned by *re* Driver (19 L. R., Eq. 352), *re* Rathbone (2 C. D. 483), *re* Dalgleish (4 C. D. 143), *re* Mundel's Trust (6 Jur. N. S. 886), *re* Matthew's Settlement (2 W. R. 85), and *re* Robinson's Will (9 Jur. N. S. 385) is not of further interest.

vi. This is in lieu of Section 2 of The Trustee Extension Act, 1852.

The jurisdiction arises where there has been *wilful refusal*, and also where there has been *mere neglect* to convey the land or release the right for twenty-eight days after the date of the requirement. For decisions showing what is *wilful refusal* see *re* Mills (40 C. D. 14) and Knight *v.* Knight (W. N. 1866, p. 114).

A written demand will usually—but not necessarily—be made, either by the party entitled to have the conveyance, or by his agent, as, for instance, his solicitor.

If a married woman refuse, a vesting order can be made (Rowley *v.* Adams, 14 Beav. 130).

Where a mortgagor of copyholds who had covenanted to surrender within a certain time had not done so, a vesting order was made by the Court (*re* Crowe's Mortgage, 13 L. R., Eq. 26).

The High Court may make an order vesting the land in any such person, in any such manner, and for any such estate as the Court may

direct, or releasing or disposing of the contingent right to such person as the Court may direct.

"Land."—In Section 50 "land" is defined as including "manors, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land."

Incorporeal hereditaments is a wide and somewhat indefinite term; but the following are certainly included within it:—Advowsons, tithes, commons, ways, watercourses, lights, offices, dignities, franchises, corodies, pensions, annuities, and rents (2 Bl. Com. 21). In "Hales's Analysis," p. 48, the following enumeration is given:—"Rents, services, tithes, commons, and other profits *in alieno solo*; pensions, offices, franchises, liberties, villeins, dignities."

Copyholds clearly come within the term corporeal hereditaments (see Section 34, *infra*).

The Court can by the vesting order vest the land in new trustees, if such are appointed (see proviso *a*), or if none are appointed, then in the sole continuing trustee, or in the continuing trustee and new trustee (*b*). It was at one time doubted whether the Court could do this under the Sections of the Act replaced by this Section, but the cases of Smith *v.* Smith (3 Drewry, 72) and *re* Marquis of Bute's Will (1 Johns. 15) have set this doubt at rest, and the express words in Sub-section (*b*) of this part of this Section render it quite clear that it can be done, notwithstanding *re* Watts's Settlement (9 Hare, 106) and *re* Plyer's Trust (*ib.* 220).

The Court can, in short, divest the whole estate from the continuing and incapacitated trustees, and vest it in the new body, whether composed of the old trustees or not, and as joint tenants (*re* Fisher's Will, 1 W. R. 505; and Smith *v.* Smith, *ubi supra*). The Court cannot and will not give any directions as to the mode of administration of the trust: its duty is confined to putting the funds in proper hands, to be administered in accordance with the trust deed, will, or other document (*re* Tayler, 2 De G. F. & J. 125).

Orders as to contingent rights of unborn persons.

27. Where any land is subject to a contingent right in an unborn person or class of unborn persons who on coming into existence would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may

make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

This Section replaces Section 16 of The Trustee Act, 1850 (13 & 14 Vict. c. 60), and in Wake *v.* Wake (1 W. R. p. 283)—a decision under that Section and equally applicable to the substituted enactment—the Court discharged the contingent rights of unborn children in favour of purchasers under a decree, and made an order vesting in such purchasers the estates of infants and the contingent estates of unborn infants. In Hargreaves *v.* Wright (*ib.* p. 408) the Court decreed in a suit for specific performance that on each purchaser in that case making payment into Court the estate comprised in his contract should be discharged from the contingent rights of unborn persons claiming under a settlement.

Vesting order in place of conveyance by infant mortgagee.

28. Where any person entitled to or possessed of land, or entitled to a contingent right in land, by way of security for money, is an infant, the High Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee.

Section 28.—This Section deals with the case of an infant mortgagee, and enables the Court to act in the same manner as it could do in the case of an infant trustee; and it replaces Sections 7 and 8 of The Trustee Act, 1850, so far as those Sections have not been dealt with by the preceding Sections of this Act—*i.e.*, it deals with cases of an infant mortgagee only (*see* notes to next Section, and *see* also Section 30 of The Conveyancing Act, 1881).

The words explanatory of the powers of the Court, in dealing with the infant's interest, are very comprehensive: the order may *vest*, *release*, *or dispose* of the land, contemplating, evidently, either an out-and-out appointment of new trustees, or the continuance of one or more of the old trustees, together with one or more new ones in the trust.

As the Court is empowered to make "an order . . . . in like manner as in the case of an infant trustee," a reference to Section 26 of this Act, and the notes thereon, will show the scope of this.

In the former Act of 1850, Section 2 contained a definition of "person of unsound mind," which was defined to mean "any person, not an infant, who not having been found a lunatic shall be incapable from infirmity of mind to manage his own affairs." The present Act does not contain any similar definition, but, notwithstanding this, it would appear that, no qualifying words being used, an infant, even though of unsound mind, comes within the operation of the Section, and, therefore, no resort to the lunacy jurisdiction need be had, but the ordinary jurisdiction in Chancery applies (*re* Arrowsmith's Trusts, 4 Jur. N. S. 1123).

Under the old practice it was not necessary to serve the infant with the petition (*re* Tweedy, 9 W. R. 398; *re* Willan, *ib.* 689); but in *re* Jones's Mortgage (22 W. R. 837)—a petition under the Trustee Act—Jessel, M. R., considered it was contrary to principle to take an estate out of a person without giving him notice. This practice should certainly be followed in applications under the present Act.

Vesting order in place of conveyance by heir, or devisee of heir, &c., or personal representative of mortgagee.

29. Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land in such person or persons in such manner and for such estate as the Court may direct in any of the following cases, namely,—

(*a*) Where an heir or personal representative or devisee of the mortgagee is out of the jurisdiction of the High Court or cannot be found; and

(*b*) Where an heir or personal representative or devisee of the mortgagee on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he will not convey the same

or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; and

(*c*) Where it is uncertain which of several devisees of the mortgagee was the survivor; and

(*d*) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or personal representative of the mortgagee whether he is living or dead; and

(*e*) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee.

Section 29.—This Section replaces Section 19 of The Trustee Act, 1850, but it differs in some respects from the repealed section: thus, for the words "*any person to whom any lands have been conveyed by way of mortgage*," in Section 19 of The Trustee Act, 1850, the words "*a mortgagee of land*" are substituted in this Act, relying no doubt on the definition in Section 50 of the expressions "mortgage" and "mortgagee" as including and relating to "every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee."

But this variation will not affect the construction and scope of the enactment. A more important variation is the insertion in each of Subsections (*a*), (*b*), (*d*), and (*e*) of the words "personal representative." This addition is introduced in view of Section 30 of The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), whereby it was enacted that estates or interests of inheritance vested in any person solely on any trust or by way of mortgage should, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative.

By Section 45 of 50 & 51 Vict. c. 78, it was enacted that Section 30 of The Conveyancing Act, 1881, "shall not apply to land of copyhold or customary tenure vested in the tenant on the court rolls of any manor upon any trust or by way of mortgage." Hence copyholds vested in a sole mortgagee will still descend to his devisee or heir, as the case may be, and the aid of this Section 29 of The Trustee Act, 1893, may have to be invoked. The reference to the heir or devisee in Sub-sections (*a*), (*b*), (*c*), (*d*), and (*e*) in this Section have reference probably solely to copyhold property (*see re* Mills's Trusts, 37 C. D. 312).

The conditions precedent to this Section coming into operation are apparently—

1. Where a mortgagee of land has died without having entered into possession, and either
2. The money due in respect of the mortgage has been paid to a person entitled to receive the same, or
3. The person entitled to receive that money consents to any order for the reconveyance of the land.

And *re* Meyrick's Estate (9 Hare, 116) was decided on this footing, but overruled in *re* Boden's Trust (1 De G. M. & G. 57; 9 Hare, 820; see also *re* Quinlan's Trust, 9 Ir. Ch. Rep. 306; *re* Lea's Trust, 6 W. R. 482), which shows that the Section is applicable to the case where the personal representative of the mortgagee is applying, the estate having gone to the heir-at-law of the mortgagee The term "reconveyance" in the Section would obviously seem to point to a reconveyance to the mortgagor, but the case cited indicates that this is not strictly read. But the application of the Section to such a case as this is of small importance since Section 30 of The Conveyancing Act, 1881, under which trust and mortgage estates devolve on the personal representative.

Under the former Act, if the mortgagee has died intestate being illegitimate, a vesting order could be made, the petition having been served on the Crown (*re* Minchin's Estate, 2 W. R. 179).

If the mortgagee has taken possession, this Section does not apply. But in *re* Skitter (4 W. R. 791) the Court did, under Section 9 of the Trustee Act (replaced by Section 26 of this Act), make an order vesting in the executors of a deceased mortgagee in fee, who had died intestate as to trust estates, the legal estate outstanding in the heir-at-law out of the jurisdiction, though the mortgagee had before her death been in receipt of the rents. The Court did this on the ground that

the 9th Section authorised such a vesting order where any person "seised or possessed of *any lands upon any trust*" was out of the jurisdiction. Section 9 is replaced, as to this, by Section 26 ii. (*b*) of this Act (*see* note to that Section).

Vesting order consequential on judgment for sale or mortgage of land.

30. Where any Court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein as heir, or under the will of a deceased person for payment of whose debts the judgment was given or order made, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagee or in any other person.

Section 30.—This Section is a re-enactment of Section 29 of 13 & 14 Vict. c. 60, and Section 1 of 15 & 16 Vict. c. 55.

This Section comes into operation whenever the Court makes an order "directing the sale or mortgage of any land."

Section 29 of the Act 13 & 14 Vict. c. 60 only applied where the sale was for the payment of debts. Section 1 of 15 & 16 Vict. c. 55 remedied this by enacting that where a sale had been directed "for any purpose whatsoever" the power comes into effect. Although these words are not to be found in Section 30, under consideration, the meaning, obviously, is that it operates in any case.

Hence the powers conferred by it can be used where the sale has been to provide costs, thus rendering Weston *v.* Filer (5 De G. & Sm. 608) obsolete (see Wake *v.* Wake, 17 Jur. 545; and see also Hancox *v.* Spittle, 3 Sm. & Gif. 478).

There are two other variations introduced in the present Section. The Section begins "*Where any Court*"; the Sections replaced speak

of "*any Court of Equity*"; while lower down in this same Section 30 the words are "*the High Court* may." "High Court," by The Interpretation Act, 1889, Section 13, Sub-section 3, means, when used with reference to England or Ireland, Her Majesty's High Court of Justice in England or Ireland, as the case may be. The other variation is the insertion of the words "or mortgage" in the second line of the Section, and "mortgagee" in the last. The repealed Sections did not include the case where the Court ordered a mortgage. To this extent, then, the law is altered.

"Every person" has been held to include persons under no disability, and who could have validly executed a conveyance of the property which it is desired to vest (Beckett *v.* Sutton, 19 C. D. 646), which case also decides that Section 1 of The Trustee Extension Act, 1852, and by analogy of reasoning this Section, applies to sales under The Partition Acts, 1868 & 1876. It also includes a lunatic not so found (Herring *v.* Clark, L. R., 4 Ch. 167).

The persons who may be declared trustees under this Section are—

(1) Any person seised or possessed of or entitled to the land as heir.

(2) Any person entitled to a contingent right therein as heir.

(3) Any person seised or possessed of or entitled to the land under the will of a deceased person for payment of whose debts the judgment was given or order made.

(4) Any person who is a party to the action or proceeding.

(5) Any person who is otherwise bound by the judgment or order.

The Court may vest the estate in the purchaser or mortgagee or in any other person as the Court thinks fit.

Hancox *v.* Spittle (*ubi supra*) was a case of vesting the land in some "other person."

Where the estate is sold in lots the purchasers can petition for a vesting order, and the costs of each purchaser are payable out of the purchase money of his lot (Ayles *v.* Cox, 17 Beav. 504).

Formerly applications under the Trustee Acts had to be by petition; but now, under R. S. C., Order 55, R. 2 (8), "Applications under The Trustee Acts, 1850 & 1852, in all cases where a judgment or order has been given or made for the sale, conveyance, or transfer of any stock, or of any hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein," are

made by originating summons in chambers, and, presumably, such applications under the present Act will be made in the same manner.

By 47 & 48 Vict. c. 71, Section 5, Section 1 of the Trustee Extension Act is made to apply to sales (thereby authorised) of the hereditaments of the Crown in an action, as if such hereditaments were vested in a subject.

This Section of the Trustee Extension Act is now repealed; but it is apprehended that the Court could under the present Act make a vesting order where it has made an order for sale coming within Section 5, Sub-section 1, of 47 & 48 Vict. c. 71 (The Intestates' Estate Act, 1884).

Vesting order consequential on judgment for specific performance, &c.

31. Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any land, or generally where any judgment is given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

Section 31.—This Section is a virtual re-enactment of Section 30 of 13 & 14 Vict. c. 60, and Section 7 of 31 & 32 Vict. c. 40, The Partition Act, 1868 (*see* also Judicature Act, 1884, Section 14, as to appointing a person to execute documents).

The High Court can make a vesting order, under this Section, in the following cases:—

(*a*) Where a judgment is given for the specific performance of a contract concerning any land, or

(*b*) For partition, or

(*c*) For sale in lieu of partition, or

(*d*) For the exchange of any land, or

(*e*) Where any judgment is given for the conveyance of any land, either in cases arising out of the doctrine of election or otherwise.

(*a*) A contract for the sale of leaseholds was held not to come within this Section (Grace *v.* Baynton, W. N. 1877, 79); but in Hall *v.* Hale (51 L. T., N. S. p. 226) Kay, J., made an order appointing a person to execute the lease, and this will no doubt be followed now.

(*b*) Orders have been made under the former Act in partition actions in Bowra *v.* Wright (4 De G. & Sm. 265), *re* Molyneux (10 W. R. 512, the case of a lunatic), *re* Sherard (1 De J. & S. 421), and Shepherd *v.* Churchill (25 Beav. 21).

(*c*) This replaces Section 7 of The Partition Act, 1868 (31 & 32 Vict. c. 40), which Section is repealed by this Act.

(*e*) For instances of orders in foreclosure actions see Lechmere *v.* Clamp (31 Beav. 578) and Foster *v.* Parker (8 C. D. 147). As to the proper form of order in a foreclosure action where there is an infant heir-at-law of the mortgagor party see Mellor *v.* Porter (25 C. D. 158).

The cases of Lees *v.* Coulton (20 L. R., Eq. 20) and Basnett *v.* Moxon (20 L. R., Eq. 182) show to what extent the Court can bind *unborn persons*, in which terms are included heirs of a living person.

What the Court does, in making the order, is either to declare that the persons in question "are trustees of the land," or to declare that "the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerned, are the interests of persons who on coming into existence will be trustees within the meaning of this Act." In Lees *v.* Coulton a form of order will be found. By Order 55, R. 2 (8), applications under The Trustee Acts, 1850 & 1852 (and it is presumed under this Act), *in all cases where a judgment or order has been given or made for the sale, conveyance, or transfer of any land or hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the*

estate or interest therein, are to be made by summons in chambers; though the Court can, under Order 70, R. 1, allow the application to be by petition, and in complicated cases that would be the right course.

Effect of vesting order.

32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the Court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

Section 32.—This Section in effect re-enacts Sections 7 to 15 of 13 & 14 Vict. c. 60, and Sections 1, 2, and 8 of 15 & 16 Vict. c. 55.

The effect of an order under this Section is to be—

(1) As if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or

(2) If there is no trustee, as if such person had existed and been of full capacity, and had duly executed all proper conveyances of the land for such estate as the Court directs.

Power to appoint person to convey.

33. In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person

to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

Section 33.—This Section re-enacts Section 20 of 13 & 14 Vict. c. 60. The conveyance by the person appointed to convey should contain a recital showing it is made in obedience to the order of the Court (but see *ex parte* Foley, 8 Sim. 395; and see also Judicature Act, 1884, Section 14).

Effect of vesting order as to copyhold.

34. (1) Where an order vesting copyhold land in any person is made under this Act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance.

(2) Where an order is made under this Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things.

Section 34.—This Section re-enacts Section 28 of 13 & 14 Vict. c. 60. It deals with two cases—

(1) Where a vesting order of copyhold is made with the consent of the lord or lady of the manor.

(2) Where an order is made appointing any person to convey any copyhold land.

(1) In the first case, the consent of the lord or lady obviates the necessity of a surrender and admittance; but there is nothing to prevent the Court making an order without such consent, the effect then being to vest the property in the intended trustee, leaving it

still necessary for him to obtain surrender and admittance, and this is what will usually happen. In such a case surrender is made and admittance obtained in due course on the proper fines being paid. The lord cannot, however, claim two fines for admittance, one of the customary heir (if there be one), and another for the admittance of the trustee; but only one on the admission of the new trustee (Bristow *v.* Booth, 5 L. R., C. P. 80). If the lord will consent to the vesting order, he can signify his consent by writing, usually a verified certificate of such consent (Ayles *v.* Cox, *ex parte* John Attwood, 17 Beav. 584).

(2) Where an order has been made appointing a person to convey, the conveyance having been executed, application will be made for admittance, which the lord or lady is bound to give, "subject to the customs of the manor and the usual payments."

The Section does not very distinctly lay down that a vesting order can be made without the consent of the lord or lady of the manor; but it is clear from the cases on Section 28 of the Act of 1850, which this Section replaces, that this can be done, and the practice has been not to serve the lord with the petition for the vesting order, nor would it be necessary to so serve the petition or summons under the Section now being discussed. A vesting order was made in *re* Hurst (cited in 2 Seton on Decrees, 5th edition, p. 1031) without the consent of the lord, and renders it clear that the Court had such power under the Section replaced by this Section, on which the same construction will doubtless be put.

Vesting orders as to stock and choses in action.

35. (1) In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed a new trustee; and

(ii.) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

(*a*) is an infant, or

(*b*) is out of the jurisdiction of the High Court, or

(*c*) cannot be found, or

(*d*) neglects or refuses to transfer stock or receive the dividends or income

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thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, or

(*e*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him; or

(iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead,

the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the Court may appoint:

Provided that—

(*a*) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and

(*b*) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone

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or jointly with any other person whom the Court may appoint.

(2) In all cases where a vesting order can be made under this Section, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the Court under this Act may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this Section according to its tenor.

(4) After notice in writing of an order under this Section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

Section 35.—This Section deals with the vesting of stock and choses in action and shares in ships, as the previous Sections have dealt with the vesting of land, and replaces Sections 20, 22, 23, 24, 25, 26, 31, and 35 of The Trustee Act, 1850 (13 & 14 Vict. c. 60), and Sections 3, 4, 5, and 6 of The Trustee Extension Act, 1852 (15 & 16 Vict. c. 55).

The expression "Stock," by the Definition Section (Section 50, *infra*), *includes "fully paid-up shares, and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity,*

or security transferable in books kept by any company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein."

The jurisdiction arises on the appointment of a new trustee by the Court, and also where a trustee is entitled *alone* or *jointly* with another to stock or a chose in action, and in the latter case—

ii. (*a*). Where such trustee is an infant.

This replaces Section 3 of The Trustee Extension Act, 1852. Under the repealed Section the Court has declared an infant beneficiary in whose name jointly with another funds are standing a trustee within the Section, but the Bank of England has refused with effect to act on such orders, and it is doubtful whether they are valid (*see re* Harwood, 20 C. D. 536; and *re* Findlay, 32 C. D. 220, and s. c. *ib.* 641).

ii. (*b*). Is out of the jurisdiction of the High Court.

The Sub-section is general, and whether the trustee be an infant or lunatic the Section applies. As to what is "out of the jurisdiction" see Hutchinson *v.* Stephens (5 Sim. 499).

ii. (*c*). Cannot be found.

This means cannot be found after all reasonable efforts have been made to discover his whereabouts.

ii. (*d*). Under this head are comprised various reasons for appointing a new trustee and vesting the property in him. These are—

(i.) Neglecting or refusing to transfer stock.

(ii.) Neglecting or refusing to receive dividends or income, or to sue or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing so to do.

"*The person absolutely entitled.*"—A tenant for life is "a person absolutely entitled" only when making an application with reference to the income; but persons appointed trustees are "absolutely entitled" (*re* Ellis's Settlement, 24 Beav. 426).

ii. (*e*). This Sub-section replaces Section 4 of the Trustee Extension Act, which was inserted in view of Mackenzie *v.* Mackenzie (5 De G. & Sm. 338). The procedure in this case might be by motion instead of by summons, as under the former practice it could be by motion instead of petition (*re* Holbrook's Will, 5 Jur., N. S. 1333), though a summons under R. S. C., Or. 55, R. 2 (8), is the safer course.

The Court being empowered to vest the right "in any such person as the Court may appoint," it has unlimited discretion, subject to the cases provided for in (*a*) and (*b*) of the latter part of this Section.

(2) This portion of the above Section re-enacts the latter part of Section 20 of 13 & 14 Vict. c. 60.

(3) This Sub-section replaces Section 26 of The Trustee Act, 1850, and Section 6 of The Trustee Extension Act, 1852. In *re* Peacock (14 C. D. 212) the usual order was varied, as the funds were invested in unauthorised securities, the order being for the appointment of new trustees, with the right to call for a transfer of the funds to the trustees themselves, *or to any purchaser or purchasers*, the trustees undertaking to hold the proceeds on the trusts of the settlement. And see *re* New Zealand Trust and Loan Company (W. N. 1892, p. 169) for remarks of the Court of Appeal on the proper form of order to adopt.

(4) Upon obtaining such an order as in this Section mentioned a notice in writing should immediately be served upon the bank, or any other company, after which the bank or such company cannot transfer any stock or pay any dividend, except in accordance with the order.

(5) The Court could not, under Section 31 of 13 & 14 Vict. c. 60, which this Sub-section replaces, order the fund into Court (*re* Parby, 29 L. T. 72); but it could order the trustees to pay in the fund under the Trustee Relief Act (*re* Thornton's Trust, 9 W. R. 475).

(6) This Sub-section replaces Section 10 of 18 & 19 Vict. c. 91, which enacted as follows:—"Shares in ships registered under the said Merchant Shipping Act, 1854, shall be deemed to be included in the word 'Stock,' as defined by The Trustee Act, 1850, and the provisions of such last-mentioned Act shall be applicable to such shares accordingly."

Persons entitled to apply for orders.

36. (1) An order under this Act for the appointment of a new trustee, or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially

interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

This Section, replacing Section 37 of 13 & 14 Vict. c. 60, deals with the procedure to be followed for obtaining such orders as are hereinbefore dealt with. An order appointing (i.) a new trustee, or (ii.) concerning any land, stock, or chose in action subject to a trust, may be made on the application—

(i.) Of any person *beneficially interested* in the land, stock, or chose in action, whether under disability or not.

(ii.) On the application of any person duly *appointed trustee* thereof.

If an order is sought concerning any land, stock, or chose in action subject to a mortgage, then the application can be made by—

(i.) Any person *beneficially interested* in the equity of redemption, whether under disability or not.

(ii.) Any person *interested* in the money secured by the mortgage.

In the case of disability the usual mode of appearing by a person, *sui juris*, as next friend or committee, has, of course, to be adopted.

As to the meaning of "beneficially interested," the following cases throw some light:—A person contingently entitled to a beneficial interest is "beneficially interested" (*re* Sheppard's Trust, 4 De G. F. & J. 423); so, too, a purchaser in a sale of the property under the order of Court is "beneficially interested" (Rowley *v.* Adams, 14 Beav. 130); creditors plaintiffs in an action for the administration of the real and personal estate of the testator are "beneficially interested" therein (*re* Wragg, 1 De G. J. & Sm. 356); but the committee of a lunatic *cestui que trust* is not (*re* Bourke, 2 De G. J. & Sm. 426).

Applications under any of these Sections respecting the appointment of new trustees, and vesting the trust property in them, or in cases under the Sections re-enacting The Trustee Acts, 1850 & 1852, where a judgment or order has been given or made for the sale, conveyance, or transfer of any stock or of any hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein, would be made by summons under R. S. C., Order 55, Rules 2 (8) and 13*a*; and also in cases where the money or securities do not exceed £1,000, or £1,000 in nominal value, the same Order applies, Rule 2 (4) & (5): otherwise the application is by petition or motion (*re* Barker, W. N. 1884, p. 237), but preferably by petition.

Powers of new trustee appointed by Court.

37. Every trustee appointed by a Court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

The effect of this Section is that all powers, whether legal or equitable, will vest in the new trustee or trustees, and be exerciseable by them. No such question can now arise as came up for decision in Newman *v.* Warner (1 Sim., N. S. 457), where it was held that a trustee appointed under the Court's ordinary jurisdiction could not exercise a legal power of sale. Under this Section, whether the trustee is appointed in an action, or in pursuance of a petition or summons under this Act, the trustee can exercise all the powers, legal and equitable, of the former trustees. The Section replaces Section 35 of 44 & 45 Vict. c. 41, which in its turn replaced the latter part of Section 27 of 23 & 24 Vict. c. 145 (Lord Cranworth's Act).

Power to charge costs on trust estate.

38. The High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.

Section 38.—Under this Section the costs and expenses *of and incident to* any such application or proceeding as mentioned in the Section can be ordered to be paid as the Court directs.

The principles established by the cases decided on Section 51 of The Trustee Act, 1850, replaced by this Section, and which will no

doubt be closely adhered to by the Court in construing and applying this Section, can be grouped as follows :—

1. Costs in cases relating to the appointment of new trustees.
2. Costs in cases of mortgagor and mortgagee.
3. Costs in cases of vendor and purchaser applications.

1. *Costs relating to appointment of new trustees.*—As a general rule, the whole costs of the application and incidental to it are payable by the *corpus* of the estate, or the *cestui que trusts*, though preferably by the trust estate, unless there are special reasons for making them payable otherwise (*re* Parby, 29 L. T. 72; *re* Fulham, 15 Jur. 69; *re* Fellows' Settlement, 2 Jur., N. S. 62).

In some cases the costs are made payable by the petitioners, as in *re* Brackenbury's Trust (10 L. R., Eq. 45), where the reversioners, petitioning for the appointment of an extra trustee, were saddled with the costs of the application, there having originally been only one, but the petitioners desired two for their own protection. Fines payable on the admission of new trustees of copyholds were ordered to be paid rateably by the tenants for life, and reversioners in proportion to their interests (Carter *v.* Sebright, 26 Beav. 374).

The new trustees have occasionally been ordered to pay the costs in the first place, which were to be a charge on the estate with interest (*ex parte* Davies, 16 Jur. 882).

Where new trustees were to be appointed of two funds, the costs were ordered to be paid thereout rateably (*re* Grant's Trusts, 2 J. & H. 764).

If a trustee who has become bankrupt, and has been requested to retire, declines to do so, he will be removed at his own cost, where a petition has been caused by his own obstinacy, unless the circumstances of his bankruptcy were such as to show that it arose from misfortune (*re* Adam's Trusts, 12 C. D. 634). The decision in *re* Adam's Trusts somewhat detracts from the authority of *re* Primrose (23 Beav. 590), where it was decided that the Court had *no jurisdiction* to order respondents whose conduct had caused the presentation of the petition to award costs against him; and this jurisdiction has been doubted by the Court as recently as the date of the decision in *re* Sarah Knight's Will (26 C. D. 82), where it was queried whether under the Judicature Acts and the Orders of 1883, Or. 65, R. 1, the Court has jurisdiction to order a respondent to a petition under The Trustee Act, 1850, to pay costs (see *re* Mills' Estate, 34 C. D. 24). It is apprehended, however, that the Court has under the Section now being discussed such

power, since the words are, "to be borne and paid in such manner *and by such persons* as to the Court may seem just," which appears somewhat wider than the terms in the former Act. As a general rule, a trustee served and appearing on a petition to appoint new trustees will get his costs (Turner *v.* Mullineux, 9 W. R. 252). Richardson *v.* Grubb (16 W. R. 176) was a case of a trustee petitioner having to pay all the costs, because he had unnecessarily presented a petition for the appointment of new trustees.

Re Primrose's Settlement, cited above, was commented on by the Lord Chancellor in *re* Woodburn's Will (1 De G. & J. p. 346), where he says, "That was a case in which a stranger was served with the petition: what jurisdiction could there be to make him pay costs unless the Act in terms gave it?"

The costs can be directed to be raised by mortgage of the property (*re* Crabtree, 14 W. R. 497).

2. *Cases of Mortgagor and Mortgagee.*—The rule as between mortgagor and mortgagee is that the mortgagor must bear the costs of obtaining a reconveyance of his property (King *v.* Smith, 6 Ha. 473, p. 473). Where the representative of the mortgagee is an infant, the mortgagor must pay the costs of a petition occasioned by such infancy (*ex parte* Ommaney, 10 Sim. 298); and also if the mortgagee devised the estate, instead of allowing it to descend, the mortgagor had still to pay the costs of a petition to get in the legal estate. This latter event cannot now happen since The Law of Property and Conveyancing Act, 1881, Section 30.

Where a mortgagee has become lunatic the general rule is still the same, that the costs occasioned by necessary applications to get in the legal estate will come out of the mortgagor's pocket (*re* Jones, 2 De G. F. & J. 554; *re* Marrow, Cr. & Ph. 142; *re* Stuart, 4 De G. & J. 317, which contains a full statement of the principle guiding the Court; but see, *contra*, *ex parte* Richards, 1 J. & W. 264, and *re* Townsend, 2 Ph. 348). But should the petition be presented by the representatives of the lunatic mortgagee, and especially if the mortgagee be beneficially interested in the moneys, the costs then come out of the lunatic's estate (*re* Wheeler, 1 De G. M. & G. 434; *re* Biddle, 23 L. J., Ch. 435; *re* Thomas, 22 L. J. 858). In *re* Viall, Hawkins *v.* Perry (8 De G. M. & G. 439), part of the costs were ordered to be paid by the mortgagee's estate. If the mortgagor is served, he is not entitled to his costs (*re* Phillips, 4 L. R., Ch. 629).

If, in addition to being a mortgagee, such mortgagee is a trustee,

the case is still clearer for making the mortgagor, or his estate, bear such costs (*re* Fulham, 15 Jur. 69; *re* Lewes, 1 M. & G. 23, where the existence of the trust appeared on the face of the mortgage). But where the trust did not appear, they were ordered to come out of the trust estate (*re* Jones, 2 C. D. 70).

In *re* Sparks (6 C. D. 361) each party was left to pay his own costs, as the mortgagee was of unsound mind, but *not so found*, the Court considering that it had no jurisdiction to order the costs to be paid out of the mortgage debt.

James, L. J., in that case considers the question of the jurisdiction conferred by the Act, and came to the conclusion that the Court could only order costs to be paid out of the lands or personal estate in respect of which the application is made. The Section of the present Act, now under consideration, is, as has been been pointed out, somewhat wider in terms, allowing the Court to order the costs to be borne and paid, not only in such manner (which the former Act did), but by *such persons* as might seem just to it.

3. *Cases of Vendor and Purchaser.*—The general rule in cases between vendor and purchaser is that the costs of procuring a person to convey, under the Trustee Acts, must be borne by the vendor, and, in general, the costs of an application to the Court under those Acts, and therefore presumably under this Act, to complete the title, must be so borne (Bradley *v.* Munton, 16 Beav. 294), in which case, by the contract, the costs occasioned by getting a person appointed to surrender were to be paid by the purchaser.

Where property is sold in lots, the vendor must pay for the costs of a petition to the Court out of the purchase money of the particular lots, and not out of funds standing to the general credit of the cause (Ayles *v.* Cox, *ex parte* John Attwood, 17 Beav. 584).

Where a person has entered into a contract to sell land, and dies, leaving an infant heir, and an action is brought to have the infant declared a trustee, the rule appears to be that each party must pay his own costs. But where the vendor has devised, there the costs would be borne by his estate, as it is not by the mere act of God that the estate has got into another person, necessitating an order for its re-transfer (Purser v. Darby, 4 K. & J. 41); and see further on this point *re* Lowry's Will (15 L. R., Eq. 1878) and *re* Manchester and Southport Railway Company (19 Beav. 365).

But cases of vesting orders being required as between vendor and purchaser will not be of such frequent occurrence as formerly, in

consequence of Section 4 of The Conveyancing Act, 1881, which is in these terms:—

"(1) Where at the death of any person there is subsisting a *contract enforceable* against the heir or devisee for the sale of the *fee simple* or *other freehold interest* descendible to his heirs general, in any land, his *personal representative* shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

"(2) A conveyance made under this Section shall not affect the beneficial rights of any person claiming under any testamentary disposition as heir or next-of-kin of a testator or intestate.

"(3) This Section applies only in cases of death after the commencement of this Act" (*31st December*, 1881).

Lysaght *v.* Edwards (2 C. D. 506) shows that to make a vendor a trustee the contract must be enforceable against both parties at the death of the vendor.

Trustees of charities.

39. The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or chose in action in any trustee of a charity or society over which the High Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the High Court under its general or statutory jurisdiction.

Section 39.—This Section re-enacts Section 45 of 13 & 14 Vict. c. 60, and empowers the Court to vest the property of charities in the new trustees thereof.

The power conferred by the Section under the former Act was exercised in the case of *re* Norton Folgate, cited in Seton on Decrees, vol. i. p. 565, 4th edition, and also in *re* Basingstoke School (see same place).

The words of this Section are wide, applying in all cases where the High Court would have jurisdiction over a charity or society upon action duly instituted.

It makes no difference, too, whether the appointment of the trustee was—

1. By instrument under a power.
2. By the High Court itself.

Orders made upon certain allegations to be conclusive evidence. 53 & 54 Vict. c. 5.

40. Where a vesting order is made as to any land under this Act or under The Lunacy Act, 1890, or under any Act relating to lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or personal representative or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or personal representative or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order; but this Section shall not prevent the High Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained.

Section 40.—This Section is a re-enactment of Section 44 of 13 & 14 Vict. c. 60, and Section 140 of 53 & 54 Vict. c. 5, and prevents an order which has been made for the appointment of new trustees being invalid by reason merely of the allegation upon which it was made being untrue; but the Section empowers the Court to direct a reconveyance when it thinks fit, and to make orders as to costs occasioned by any order improperly obtained.

Application of vesting order to land out of England.

41. The powers of the High Court in England to make vesting orders under this Act shall extend to all land and personal estate in Her Majesty's dominions, except Scotland.

Section 41.—The corresponding Section of 13 & 14 Vict. c. 60, Section 54, was not in quite the same terms, the words being "the dominions, plantations, and colonies belonging to Her Majesty (except Scotland)"; the words in the Section now under consideration being "in Her Majesty's dominions"; but this makes, it is apprehended, no material difference. Cases where lands were in Ireland and Canada occurred while the former Act was in force, and the Court under Section 54 made orders (*re* Hewitt's Estate, 6 W. R. 537; *re* Tait's Trusts, W. N. 1870, 257; *re* Schofield, 24 L. T. 322; *re* Groom, 11 L. T., N. S. 336; and see *re* Lamotte, 4 C. D. 325).

Payment into Court by Trustees.

Payment into Court by trustees.

42. (1) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to Rules of Court, be dealt with according to the orders of the High Court.

(2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court.

(3) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the Court may

order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into court, and every transfer, payment, and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered.

Section 42.—In considering this Section the definition of "*Trustee*" must be borne in mind. By Section 50 the expression "Trust" does not include the duties incident to an estate conveyed by way of mortgage; but, with this exception, the expressions "Trust" and "Trustee" include implied and constructive trusts, and the duties incident to the office of personal representative of a deceased person.

The Section in question (Section 42) replaces 36 Geo. III. c. 52, Section 32; 10 & 11 Vict. c. 96, Sections 1 and 2; 11 & 12 Vict. c. 68; and 12 & 13 Vict. c. 74, Section 1.

The subject matter of the Section may, for convenience of dealing with it, be subdivided thus:—

(A) Who may pay trust money into Court.

(B) How payment into Court is made.

(A) *Who may pay trust money into Court.*

"*Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust.*"

Thus it is quite clear that trustees, whether on express, implied, or constructive trusts, and also the personal representatives of a deceased person, whether executors or administrators, can avail themselves of this procedure.

Section 25 of The Judicature Act, 1873, Sub-section 6, is in these terms:—"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the *debtor trustee* or *other person* from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such

notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always that if the debtor trustee or other persons liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Act for the Relief of Trustees."

Hence a "*debtor trustee or other person*" within the meaning of this Section can adopt the mode of acting indicated by Section 42 of The Trustee Act, 1893, and pay the money in his hands into Court.

The owner of an estate charged with a sum in favour of another is not a trustee within the Act (*re* Buckley, 17 Beav. 110; and Cox *v.* Cox, 1 K. & J. 251, 254).

An insurance company may, since the Judicature Act, above quoted, as they are debtors in respect of the funds, pay them into Court, thus rendering Matthew *v.* Northern Assurance Company (9 C. D. 80) obsolete law.

It has been decided that a mortgagee who has sold under his power is within the meaning of the Section replaced by this one (Roberts *v.* Ball, 1 Jur. N. S. 585); but a bank which has received notice of conflicting claims respecting a deposit in its hands is not a trustee (*re* Sutton's Trusts, 12 C. D. 175).

The power of trustees to pay in applies to "*money or securities belonging to a trust.*"

"*Securities,*" by Section 50, includes stocks, funds, and shares, and, *so far as relates* to payments into Court, has the same meaning as in The Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44). By Section 3 of that Act the term "securities" includes Government securities, and any security of any foreign State, any part of Her Majesty's dominions out of the United Kingdom, or any body corporate or company, or standing in books kept by any body corporate, company, or person in the United Kingdom, and all stocks, funds, and effects.

Of course the Court can give such directions as it thinks fit as to whether the securities shall be retained in their original form, or sold and re-invested differently, and probably would do so in proper cases. The last clause of Section 42 (1) seems to cover such circumstances:

"and the same shall, subject to Rules of Court, be dealt with according to the orders of the High Court."

(B) *How payment into Court is made.*

The following is the existing rule (Supreme Court Funds Rules, 1886, R. 41) dealing with payment of funds into Court, and doubtless an analogous procedure will be followed in cases under the Section now under discussion:—

"When a trustee or other person desires to lodge funds in Court in the Chancery Division under the Act 10 & 11 Vict. c. 96, he shall annex to the affidavit to be filed by him pursuant to the said Act a Schedule in the same printed form as the Lodgment Schedule to an Order, setting forth—

"(*a*) His own name and address.

"(*b*) The amount and description of the funds proposed to be lodged in Court.

"(*c*) The ledger credit in the matter of the particular trust to which the funds are to be placed.

"(*d*) A statement whether legacy or succession duty (if chargeable), or any part thereof, has or has not been paid.

"(*e*) A statement whether the money or the dividends on the securities so to be lodged in Court, and all accumulations of dividends thereon, are desired to be inserted in any, and what, description of Government securities, or whether it is deemed unnecessary so to invest the same.

"An office copy of such Schedule is to be left with the paymaster."

Under the practice hitherto existing with regard to payment in, the trustee has to file an affidavit shortly describing the nature of the trust, but not necessarily giving the names of the persons interested in the fund (*re* Waring, 16 Jur. 652).

Rule 74 is in these terms:—"When it is stated in the schedule to the affidavit made pursuant to Rule 41 that it is desired that any money to be lodged in Court, or the dividends accruing on any securities to be lodged in Court in pursuance of the Act 10 & 11 Vict. c. 96, and the accumulations thereof, shall be invested in any description of Government securities, the Paymaster shall (if or so soon as such money shall amount to or exceed £40, or so soon as dividends accruing on such securities shall amount to or exceed £10) invest the same accordingly, with any order or further request for that purpose. If such money does not amount to £40 (and is not less than £10) the Paymaster shall place such money on deposit without a request for

that purpose, unless the said schedule contains a statement that it is deemed unnecessary to place such money on deposit, or unless notice in writing be left at the Pay Office of an order having been made or of an intended application to the Court affecting such money, securities, or dividends. Dividends accruing on funds or on investments or accumulations of funds lodged in Court under the said Act prior to the commencement of the Chancery Funds Rules, 1872, may, when or so soon as they amount to or exceed £10, be invested without any request."

The money is (under the practice hitherto in force) paid to the account of the Paymaster-General "In the matter of the particular trust, describing the same by the names of the parties as accurately as may be for the purpose of distinguishing it." (See the repealed Section 10 of 10 & 11 Vict. c. 96.) On this point the cases of *re* Jervoise (12 Beav. 209) and *re* Joseph's Will (11 Beav. 625) may be referred to. Where different trusts affect aliquot parts of the fund, the parts ought to be paid in to separate accounts. No doubt Rules of Court will in due course be published dealing with the subject of "payment in," and also that of "payment out"; but until they are, the practice hitherto existing will, it is apprehended, continue to be followed.

A trustee who pays a fund into Court is not now bound to give notice to the persons entitled to the fund (*re* Graham's Trusts, 1891, 1 Ch. 151; but see *re* Stening's Trust, 50 L. T., N. S. 586).

If notice of payment in is given to the persons interested, it is done by sending them registered letters.

"*The same shall, subject to Rules of Court, be dealt with according to the orders of the High Court.*"—Rules will no doubt be published dealing with this, but in the meantime the existing practice as to "payment out," and otherwise, will apply (see Daniell's Chancery Practice, 2,065 *et seq.*).

Where the money paid in belongs to a lunatic (so found) the Court can order payment to the Poor Law Guardians for the maintenance of the lunatic. If not so found, the Court can still order maintenance (*re* Upfull's Trust, 3 McN. & G. 281; *re* Burke, 2 De G. F. & J. 124).

(2) "*The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court.*"—The receipt or certificate is a discharge only to the extent of the funds paid in (Beaty *v.* Curson, L. R. 7 Eq. 194). The payment is in effect a retirement of the trustees from their office, and they can no longer exercise their powers as trustees (*re* Nettlefold's Trusts, W. N. 1888, p. 120).

Costs.—The costs of the trustees incident to the payment in, if not disputed, can be deducted; but if there is any difference about them, it is the proper course to pay in the whole, and apply for payment when any application is made by a person interested about the fund with reference to it (Beaty *v.* Curson, L. R. 7 Eq. 194). But the Court cannot order repayment of costs improperly deducted on payment in. Where an application is being made for payment out, a separate proceeding must be instituted to recover the excess (*re* Parker's Will, 39 C. D. 303).

Procedure.—Payment out or any application with reference to the fund where the money or securities in Court do not exceed £1,000, or £1,000 nominal value, should now be made by summons under Or. 55, R. 2 (2), (4), and (5), or even if the fund exceeds that amount where the case comes under Or. 55, R. 2 (1)—that is where there has been a judgment or order declaring the rights, or where the title depends only upon proof of the identity, or the birth, marriage, or death of any person (*re* Broadwood, 55 L. J., Ch. 646).

Payment into Court was a procedure much resorted to by trustees desirous of ascertaining the persons entitled to a fund; but it should not, under the present practice, be indiscriminately resorted to (see the cases of *re* Woodburn's Will, 1 De G. & J. 333, and *re* Cater's Trust, 25 Beav. 361; and Daniell's Ch. Prac. p. 2,080); for now on summons under Or. 55, R. 3 (*b*), trustees can have the opinion of the Court as to the persons interested in a fund by taking out an originating summons (*re* Giles, 34 W. R. 712).

(3) "*Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court,*" &c.—This Sub-section is a re-enactment of 12 & 13 Vict. c. 74, and under it the procedure was by way of petition (see *re* Broadwood's Trust, 8 L. T., N. S. 632).

"And where any such moneys or securities are deposited with any *banker, broker, or other depositary*, the Court may order payment or delivery of the moneys or securities *to the majority of the trustees* for the purpose of payment into Court."

Under this clause the banker, broker, or other depositary has to transfer the money to the trustees, who then pay it into Court.

The provision at the end of the Section, that "every transfer, payment, and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or

by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered," evidently means that the depositaries would be no longer liable for the fund, whatever happens, after it has passed from them to the trustees.

Miscellaneous.

Power to give judgment in absence of a trustee.

43. Where in any action the High Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the action and give judgment therein against that person in his character of a trustee, as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

Section 43.—This Section is, in effect, a re-enactment of Section 49 of 13 & 14 Vict. c. 60, that Section being repealed by the present Act (*see* Section 51 and Schedule).

As to the practice under the repealed Section see Westhead *v.* Sale (6 W. R. 52) and Burrell *v.* Maxwell (25 L. T., N. S. 655).

Power to sanction sale of land or minerals separately.

44. (1) Where a trustee is for the time being authorised to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or so disposing of the minerals, with or without the said rights or powers, separately from the residue of the land.

(2) Any such trustee, with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the Court, so dispose of any such land or minerals.

(3) Nothing in this Section shall derogate from any power which a trustee may have under The Settled Land Acts, 1882 to 1890, or otherwise.

Section 44.—This Section in effect, so far as trustees are concerned, replaces Section 2 of 25 & 26 Vict. c. 108, which Act is wholly repealed by the present Act (*see* Section 51 and Schedule).

The 2nd Section of the repealed Act extended not only to trustees, but to every other person authorised to dispose of land by way of sale, and these words were held to include mortgagees (*re* Beaumont's Mortgage Trusts, 12 L. R., Eq. 86; *re* Wilkinson's Mortgaged Estates, 13 L. R., Eq. 634; *re* Hirst's Mortgage, 45 C. D. 263).

The effect of the total repeal of the 2nd Section of 25 & 26 Vict. c. 108, will, it is submitted, be to deprive mortgagees of the power of obtaining the sanction of the Court to a sale of land and minerals separately, for it is conceived that the word "trustee" in this Section of the present Act could hardly be taken to include a mortgagee with power of sale. A mortgagee, when exercising his power of sale, is often spoken of as acting in a fiduciary character, but still his position is very different from that of a trustee for sale (Farrar *v.* Farrars, Limited, 40 C. D. 395, 410). And it is, moreover, declared by the 50th Section of the present Act (*see infra*) that the expression "trust," as used in the Act, does not, unless the context otherwise requires, include the duties incident to an estate conveyed by way of mortgage.

The 19th Section of The Conveyancing and Law of Property Act, 1881, confers on a mortgagee, where the mortgage is made by deed, a power, when the mortgage money has become due, to sell the mortgaged property or any part thereof. It is apprehended, however, that the words "or any part thereof" apply only to a sale of a separable part of the mortgaged property in the state in which it was subjected to the mortgage, and do not, therefore, authorise a sale of minerals apart from the surface (*re* Yates, Batcheldor *v.* Yates, 38 C. D. 112, 121, 128).

It was the practice of the Court, under the repealed Act, to make

an order authorising the sale of land reserving the minerals, or of the minerals apart from the land without reference to any particular sale (*re* Willway's Trust, 32 L. J., Ch. 226).

It will be observed that the power conferred by this Section may be negatived by the instrument creating the trust or direction to sell.

Power to make beneficiary indemnify for breach of trust.

45. (1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2) This Section shall apply to breaches of trust committed as well before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the Twenty-fourth day of December, One thousand eight hundred and eighty-eight, and is pending at the commencement of this Act.

Section 45.—This Section makes a useful and important extension in the law as administered in the Courts of Equity before the passing of The Trustee Act, 1888 (51 & 52 Vict. c. 59), of which it replaces Section 6.

By virtue of it a trustee, or person claiming under him, will now be able to claim to be indemnified by a beneficiary against the consequences of a breach of trust where the breach has been committed—

(1) At the instigation or request, or

(2) With the consent in writing of the beneficiary,

by having the beneficiary's interest impounded in whole or in part, and this, too, even where the beneficiary is a married woman, entitled for her separate use, and whether with or without restraint on anticipation. The Court, however, has a full discretion to give or withhold

this indemnity, and the claim to it will not be granted *ex debito justitiæ*. The Section applies to all breaches of trust committed, as well before as after the passing of the Act, provided there was no action or other proceeding pending on December 24, 1888, and still pending on January 1, 1894, with respect to the breach in question (Sub-section 2).

The effect of this Section can be most conveniently seen by referring to the law as it stood before The Trustee Act, 1888. It is clear that beneficiaries who have not been parties or privy to a breach of trust concurred in or instigated by another beneficiary could impound that other beneficiary's interest in the trust fund which may have accrued either directly or derivately (Irby *v.* Irby, 25 Beav. 632; Jacubs *v.* Rylance, 17 L. R. Eq. 341), or derived from some other estate comprised in the same settlement (Woodyatt *v.* Gresley, 8 Sim. 180), to compensate the trust estate for the loss for which the beneficiary is responsible. The law is not altered on this head by this Act.

Where a beneficiary has instigated and concurred in a breach of trust committed by a trustee, the right of the trustee against the beneficiary for indemnity under the law, as it existed prior to The Trustee Act, 1888, may be considered under two heads—

(*a*) Where the beneficiary is not himself a co-trustee of the fund.

(*b*) Where the beneficiary is a co-trustee.

As to (*a*), the rule was that the defaulting trustees who had been made liable had a right to be indemnified to the extent to which the concurring beneficiary in question had benefited by the breach of trust. One of the earliest cases is Trafford *v.* Boehm (3 Atk. 440), where Lord Hardwicke lays down the rule in these terms: "If a trustee errs in the management of the trust, and is guilty of a breach, yet if he goes out of the trust with the approbation of the *cestui que trust*, it must be made good first out of the estate of the person who consented to it." This is not strictly accurate, as subsequent cases show that the trustee would be primarily liable, but with a right of indemnity over against the concurring beneficiary to the extent to which the latter had benefited by the breach. This was the rule adopted in Booth *v.* Booth (1 Beav. 125), where the M. R. said: "If she (the widow who was entitled to a life interest in one moiety of trust funds) has obtained any benefit from the breach of trust, the trustee ought to be compensated in respect of it."

The true rule is explicitly laid down in Raby *v.* Ridehalgh (7 D. M. & G. 104), which is the leading case on the subject. In that case a breach of trust had been committed by the trustees, who had invested on

insufficient security at the instance and request of the life tenants, who had received a higher rate of interest in consequence. Lord Justice Turner, in the course of the case, remarked: "Has the Court, in a suit of this nature, ever gone the length of ordering the *cestui que trust* personally to recoup the trustee?"

In giving judgment he said: "It seems to me to be the necessary consequence of the *cestuis que trustent* for life having received the income of the trust fund unduly invested, that the trustees have a right to be indemnified as against the *cestuis que trustent* for life or their estates, to the extent to which those estates have been benefited by the improper investment," and he dissented from the judgment in the Court below, which made the tenants for life liable to recoup the trustees the whole sum they had been ordered to pay in respect of the loss occasioned by the breach of trust.

As to (*b*), where the beneficiary who had concurred in the breach was also a co-trustee, the other co-trustees had a lien on his interest in the trust funds to recoup to them a proportionate share of the amount paid by them to make good the loss sustained by the trust estate (Prime *v.* Savell, W. N. 1867, p. 227).

In Birks *v.* Micklethwaite (33 Beav. 409) the M. R. said: "When two trustees are jointly and severally liable to make good a trust fund, the plaintiff may recover the whole from either of them, and the one who pays the whole is entitled to contribution as against the other; and if there is any fund in Court in the suit which is payable to the latter, it is the daily practice to apply to the Court to impound the fund, in order to make good what is due from him."

Cotton, L. J., in Bahin *v.* Hughes (31 C. D. 390: see p. 395), after remarking that there were very few cases in which one trustee who has been guilty with a co-trustee of breach of trust and held answerable has successfully sought indemnity as against his co-trustee, and while declining to lay down any limitation of the circumstances under which one trustee would be held liable to the other for indemnity, pointed out that so far as the cases had gone relief had only been granted against a trustee who had himself got the benefit of the breach of trust, or between whom and his co-trustees there had existed a relation which would justify the Court in treating him as solely liable for the breach of trust; but those observations, it is apprehended, only apply to cases where one defaulting trustee is endeavouring to claim total immunity by making his co-trustee liable for the whole loss.

The law has since the 24th of December, 1888, been and in future

under this Act will be, that a beneficiary who has instigated, requested, or consented in writing to a trustee committing a breach of trust, whether the beneficiary has benefited or not (and whether he is himself a co-trustee or not), will be liable to recoup the trustee or his co-trustee, as the case may be, to the whole extent of the beneficiary's interest in the fund; and if he has benefited by the breach, the indemnity is not confined merely to the amount of any benefit which he may have so received, subject always, however, to the discretion of the Court as to how far the indemnity should extend.

"*Such order as to the Court shall seem just, for impounding*," &c.—There have been two decisions by the Court with reference to the extent of this discretion. In Ricketts *v.* Ricketts (64 L. T., N. S. 283) Romer, J., would not give the trustee the benefit of the indemnity, because in that case he must be taken to have been aware he was committing a breach of trust. This decision is dealt with at more length below. The other case was a decision of Kekewich, J. (Griffith *v.* Hughes, 1892, 3 Ch. 105). There the defendant was trustee for a married woman without power of anticipation. In February, 1884, she applied to and requested the defendant to advance to her out of the trust estate the sum of £80, stating that the advance would save her home from being sold up, as she and her husband were being pressed for payment of debts amounting to that sum. There was no document in writing signed by her instigating, requesting, or consenting to the payment. Under these circumstances the trustee was ordered to pay the £80 into Court, but with a right to resort by way of indemnity to the income payable to the beneficiary on the point of the extent of the discretion of the Court. Kekewich, J., said (p. 108): "I think that if a Statute gives the Court power . . . to protect a trustee from loss, when, without moral dishonesty, he has committed a breach of trust for the benefit of other persons standing on a footing of equality with himself as regards knowledge of the facts which constitute the breach of trust, and who, therefore, are not in a position to blame him for his conduct—I think, I say, that when the Statute enables that to be done if the Court shall think fit, the Court naturally leans towards exercising the power in favour of the trustee."

In Ricketts *v.* Ricketts, R. was entitled absolutely in remainder to the trust funds of his mother's marriage settlement, which she had appointed to him by deed, subject to her own life interest. By his own marriage settlement R. covenanted to pay £10,000 to his trustees within six months after his mother's death, and in case of his death in his

mother's lifetime that his executors should pay his trustees during his mother's life £400 per annum, to be applied as if it were income of the £10,000. R. took the first life interest under his settlement, with remainder to his wife for life. R. assigned to his trustees, as security, the trust funds of his mother's settlement. The trustees of the mother's settlement had notice of the assignment. R. having become embarrassed, the trustees of the mother's settlement were induced, on the entreaty of R., his mother, and his wife, to apply a large portion of the trust funds in discharge of R.'s debts. The trustees of R.'s settlement brought an action against the trustees of the mother's settlement for breach of trust, claiming that they might replace the funds. The defendants counterclaimed (*inter alia*) that the interest of R. and his wife in the funds might be impounded and declared liable to indemnify them.

Romer, J., decided that R. and his wife were not, in respect of their interests under settlement, beneficiaries under the settlement of his mother, and that the trustees of the latter were not entitled to have his and his wife's interest under the former impounded under Section 6 of The Trustee Act, 1888. It is true (the Judge went on to say) that, even if he did regard those interests of R.'s wife such as to make her a "*beneficiary in the trust estate*" under the mother's settlement, he would not have been justified in impounding that interest by way of indemnity, "seeing that the defendants committed their breach of trust, not owing to any misrepresentation or deceit on her part, but with their eyes open, when they must be taken to have known that her interest could not be validly dealt with." This was not necessary for the decision of the case, and must, it is submitted, be regarded as an *obiter dictum*, and not to have too much importance attached to it since Griffith *v.* Hughes (1892, 3 Ch. 105), cited and commented on above.

"*At the instigation or request or with the consent in writing of a beneficiary.*"

Hitherto it has been at least doubtful whether the mere consent of a beneficiary to a breach was sufficient to bind that beneficiary's interest, and certainly it would not be so bound if the beneficiary were a married woman. In Sawyer *v.* Sawyer (28 C. D. 595), where trustees had sold out trust funds with the consent of a husband and wife who took life interests under the settlement, and in breach of trust advanced the proceeds to the husband, he and his wife giving joint and several promissory notes to secure the amounts so advanced, which were

eventually lost, the trustees claimed a right to retain the income of the property subject to the trust, in order to recoup themselves for the money which they were liable to repay in respect of the breach of trust. Chitty, J. (*see* p. 598) drew a distinction between instance or request, and consent: he said, "I hold that the law is, that for the trustees to be entitled to the order which they now ask against the estate of the tenant for life, it must be shown that the breach of trust was committed at the instance and request of the *cestuis que trustent*. I make no distinction between instance and request, but it must be shown clearly that the breach of trust was instigated by them, and that they were acting and moving parties in it," and held that Mrs. Sawyer's interest could not be impounded to recoup the trustees.

The L.JJ. before whom the case came on appeal said, "Before a trustee can claim the benefit of any charge or right of retainer against the interest of a married woman in the fund, it appears to us to be reasonable that he should show that the charge or right of retainer was created by her with a full knowledge of all the circumstances. It is probable that in the case of a man of full years the Court would presume him to be so acting; but in the case of a *feme covert* we do not think the presumption exists in favour of the trustee, whose primary duty was to protect the fund for her benefit."

By the Section now under consideration a distinction is drawn between "instigation or request" and "consent," since the latter has to be "in writing" to bind the beneficiary. That the "instigation" or "request" need not be in writing is clear from the ordinary grammatical construction of the phrase, and this has been decided to be the proper construction by Kekewich, J., in Griffiths *v.* Hughes [1892], 3 Ch.: see p. 105.

On p. 109 Kekewich, J., said: "It is common ground that there is nothing here in writing. It is equally common ground that the payment was made at the request of the married woman who is the beneficiary. Is that request, which was presumably by parol only, no writing having been proved, sufficient to bring the case within the statute? I have no doubt that the Section might be read grammatically, 'At the instigation in writing or request in writing, or with the consent in writing'; that is to say, so as to make the words 'in writing' govern or apply to all the three antecedents. But I think that that would be somewhat crabbed language, and I do not think that one can suppose the draftsman intended that; though, no doubt, to repeat the words 'in writing' three times over, as I have just done

by way of explanation, would be extremely awkward. . . Therefore, finding, as I think I do, that there may be good ground for the distinction between a consent which is to be given in writing and an instigation or request which need not be in writing, and seeing that grammatically the Section will certainly bear the construction which I think ought to be given to it, I hold that the words 'in writing' apply only to consent, and are not applicable to instigation or request. In the present case, therefore, the trustee will have to pay the £80 into Court, but will be entitled to resort by way of indemnity to the income payable to the married beneficiary."

Practically, where the impulse to commit the breach of trust for which the trustee is seeking indemnity from the beneficiary has emanated from the latter, evidence of a parol instigation or request will be sufficient; while on the other hand, where the breach of trust is suggested by one beneficiary or a trustee, and another beneficiary has merely consented thereto and is not actually benefited by the breach, as, for instance, if he is a remainderman, then written evidence of such consent by the latter is necessary. The consent may probably be given in any form, so long as it is in writing.

A recent case (*re* Somerset's Settlement Trusts, Somerset *v.* Earl Poulett and others, before the Court of Appeal, reported in the *Daily News* for Nov. 11, 1893, and in 68 L. T., N. S. 613) throws considerable light on this Section, and shows that even where a beneficiary may have instigated, requested, and consented in writing to an unauthorised investment, it is necessary to show that he did it with full knowledge of the facts, and that where trustees had made an investment on an insufficient security with the consent of a beneficiary, and it was not shown that he requested that it should be made without due inquiry into the sufficiency of the security, his interest could not be impounded to make good to the trustees the amount they had to replace. The facts shortly were as follows:—On the marriage of one V. S., in 1875, property was vested in four trustees for V. S. and his wife for their lives, and then to be divided among their children. The property was at the time invested in stocks and shares, which were worth some £35,000. Soon after his marriage, V. S. was anxious that these securities should be realised, and the proceeds invested on a mortgage of Lord Hill's Hawkstone estate in Shropshire. The trustees entertained the proposal, and employed a valuer of eminence to value the property. He estimated it at £42,750, and they in 1878 ultimately advanced to Lord Hill the whole of the trust funds. In point of fact

the valuation was much too high: the land only produced an income of about a thousand pounds, not enough to pay the interest on the mortgage, and even if correct it would not, according to the settled rule, have warranted the trustees in advancing more than two-thirds of the amount, or £28,500. Down to 1890 the interest on the mortgage was regularly paid, but then it ceased, and it was discovered that the security was deficient. Practically, part of the trust estate was gone, though the exact loss had not been ascertained. This was an action by V. S., charging the three surviving trustees with breach of trust, and claiming that they should make good the deficiency.

The defendants set up the Section of The Trustee Act, 1888, relating to the limitation of actions against trustees, and claimed (in the event of being held liable) to impound the life interest of V. S.

Lord Justice Lindley said that the first question raised by the appeal was whether the Statute of Limitations was a bar to the claim of V. S. to have the trust money made good, and there was also the question whether the trustees were entitled to be indemnified out of the plaintiff's life interest. The breach of trust for which the trustees were liable was the investment of trust money amounting to £35,000 upon the mortgage of the Hawkstow estate, in Shropshire, belonging to Lord Hill. The advance was made in August, 1878, and the mortgagor paid the interest to the plaintiff as tenant for life till August, 1890. The action was brought in February, 1892, more than six years after the investment, but considerably less than six years after the last payment of interest. Upon the first point the appeal, in his opinion, failed. As to the second, it was clear that the appellant *instigated, requested, and consented in writing to the investments; but the evidence did not show that he requested that it should be made without due inquiry into the sufficiency of the security. Whether the appellant knew at the time that the income of the estate was not, as had been stated,* £1,700, *but* £1,070 *a year, was a very important question.* Mr. Justice Kekewich found that he did know it, and that the life interest of V. S. ought to be impounded to make good to the trustees the amount they would have to replace; but the evidence did not, in his (Lord Justice Lindley's) opinion warrant that conclusion. For these reasons he was unable to concur with the judgment of the Court below upon the second point, and the order must be varied accordingly. The result would be that the appellant would receive the income created by the trust fund, but he would not receive any personal benefit from what the trustees had to make good. (See S. C., 38 Sol. J., p. 39.)

See, also, S. C., 41 W. R. 536, and *Times* L. R., Nov. 15, 1893, p. 46.

"*Notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation.*"

This enactment affords one more instance of an Act of Parliament having been necessary to enable the Court to deal with its own creation, the restraint upon anticipation of the income of a *feme covert*, as to which Malins, V.C., in Stanley *v.* Stanley, 7 C. D., at p. 591, remarked, "In no case and by no device whatever can the restraint upon anticipation be evaded." This power was exercised in Griffiths *v.* Hughes (*ubi supra*, p. 110), but not in Ricketts *v.* Ricketts (as to which see note above).

The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), Section 39, gave the Court power, when it appeared to be for the benefit of a married woman, to bind her interest in any property, even though she were restrained from anticipation; but this power is of course never exercised in the case of a breach of trust committed or concurred in by her.

Procedure.

Where the trustee who has committed the breach of trust and the beneficiary against whom he claims indemnity are already parties as defendants to an action brought in respect of the breach, Order 16, Rule 55, of the Rules of the Supreme Court applies (*per* Chitty, J., in Sawyer *v.* Sawyer, 28 C. D. 595: see p. 601).

As to form of Order in such an action see Butler *v.* Butler, 14 C. D. 329, p. 334.

If the beneficiary who has benefited is not already a party to the action, the "Third Party Procedure" under Order 16, Rules 48 to 54, would, it is apprehended, be applicable, Sawyer *v.* Sawyer (*ubi supra*) being by analogy an authority to this effect (*see* also *re* Harrison, Smith *v.* Allen [1891], 2 Ch. 349).

For form of notice to be served under Order 16 see Bahin *v.* Hughes, 31 C. D. 390, at p. 392, and the Second Appendix hereto, Form 8, p. 183.

Jurisdiction of palatine and county courts.

46. The provisions of this Act with respect to the High Court shall, in their application to cases within the jurisdiction of a palatine court or county court, include that court, and the procedure under this Act in palatine courts and county courts shall be in accordance with the Acts and rules regulating the procedure of those courts.

Section 46 replaces 17 & 18 Vict. c. 82, Section 11 (The Court of Chancery of Lancaster Act, 1854), and 52 & 53 Vict. c. 47, Section 8 (The Palatine Court of Durham Act, 1889), and also a portion of Section 21 of 13 & 14 Vict. c. 60 (The Trustee Act, 1850). This enactment would not, it is apprehended, permit the County or Palatine Court to make orders in lunacy (*re* Ormerod, 3 De G. & J. 249).

The High Court.—By The Interpretation Act, 1889, "High Court," when used with reference to England or Ireland, shall mean Her Majesty's High Court of Justice in England or Ireland, as the case may be.

Cases within the Jurisdiction of a Palatine Court.—The Palatine Courts which have jurisdiction in trust matters are the Courts of Chancery of the County Palatine of Durham and of the County Palatine of Lancaster.

By Section 16 of The Judicature Act, 1873, the jurisdiction of the Court of Common Pleas at Lancaster and at Durham was vested in the High Court of Justice, leaving the Chancery jurisdiction still vested in them, except in the matter of appeals in Lancaster, which jurisdiction is vested in The Court of Appeal Judicature Act, 1873, Section 18 (2).

As to the Palatine Court of Durham, The Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47), amends and regulates the practice and proceedings therein. Section 8 of that Act, which authorised the Palatine Court to exercise all the powers and authorities under The Trustee Act, 1850, is repealed by this Act (The Trustee Act, 1893: see Schedule), but the Section now under discussion replaces it.

The procedure and practice in the Court of Chancery of the County Palatine of Lancaster is dealt with in The Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23).

Section 3 of that Act enacts that the Court of Chancery of the County Palatine shall, as regards all persons, bodies corporate, and property within or becoming subject to its jurisdiction, have and exercise the like powers and jurisdiction and in a similar manner and subject to the same restrictions in all respects as the High Court in its Chancery Division now has and exercises, or may under or by virtue of any Act of Parliament hereafter passed, and not expressly enacting to the contrary hereof, have and exercise in respect of all persons, bodies corporate, and property within its jurisdiction.

Cases Within the Jurisdiction of a County Court.

(A) *As to County Courts in England.*

The County Courts Act, 1888 (51 & 52 Vict. c. 43), consolidated and extended the provisions of the former County Courts Acts. The County Court jurisdiction in matters the subject of The Trustee Act, 1893, is defined in Sections 67 and 68 of The County Courts Act, 1888, which (omitting immaterial provisions) are as follows:—

Section 67.—The Court shall have and exercise all the powers and authority of the High Court in the actions or matters hereinafter mentioned, that is to say—

For the execution of trusts in which the trust estate or fund shall not exceed in amount or value the sum of five hundred pounds:

Under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts in which the trust estate or fund to which the action or matter relates shall not exceed in amount or value the sum of five hundred pounds.

In all such actions or matters the Judge shall, in addition to the powers and authorities possessed by him, have all the powers and authorities, for the purposes of this Act, of a Judge of the Chancery Division of the High Court, and the Treasurer, Registrar, and the High Bailiff respectively shall in all such actions or matters discharge any duties which an officer of the said Division can discharge, either under an order of a Judge of the said Division, or under the practice thereof, and all officers of the Courts shall in discharging such duties conform to any rules or orders made in that behalf under this Act.

Section 68.—If during the progress of any action or matter under the last preceding Section it shall be made to appear to the Judge that the subject matter exceeds the limit in point of amount to which the jurisdiction of the Court is therein limited, it shall not affect the validity of any order already made, but it shall be the duty of the Judge to direct the action or matter to be transferred to the Chancery Division of the High Court, and the whole of the procedure in the said action or matter, when so transferred, shall be regulated by the Rules of the Supreme Court: Provided always that it shall be lawful for any party to apply to a Judge of the said Division at Chambers for an order authorising and directing the action or matter to be carried on and prosecuted in the County Court, notwithstanding such excess in the

amount of the limit to which equitable jurisdiction is given by the said Section; and the Judge, if he shall deem it right to summon the other parties, or any of them, to appear before him for that purpose, after hearing such parties, or, on default of the appearance of all or any of them, shall have full power to make such order.

Section 70.—Any moneys, annuities, stocks, or securities vested in any persons as trustees, executors, administrators, or otherwise upon trusts within the meaning of the Trustees Relief Acts, where the same do not exceed in amount or value the sum of five hundred pounds, upon the filing by such trustees or other persons, or the major part of them, with the Registrar of the Court within the district of which such persons, or any of them, shall reside, of an affidavit shortly describing, according to the best of their knowledge, the instrument creating the trust, may, in the case of money, be paid into a Post Office savings bank established in the town in which the Court is held in the name of the Registrar of such Court, in trust to attend the orders of the Court, and upon such persons filing with the Registrar the receipt or other document given to them by the officer of the said bank, the Registrar shall record the same and give to them an acknowledgment in such form as may be prescribed, which acknowledgment shall be a sufficient discharge to such persons for the money so paid, and in the case of stocks or securities may be transferred or deposited into or in the names of the Treasurer and Registrar of such Court in trust to attend the orders of the Court, and the certificate of the proper officer of the transfer or deposit of such stocks or securities shall be a sufficient discharge to such persons for the stocks or securities so transferred or deposited, and for the above purposes all the powers and authorities of the High Court shall be possessed and exercised by the Courts, and any order made by virtue of such powers and authorities shall fully protect and indemnify all persons acting under or in pursuance of such order.

Section 71.—Any money paid into Court in the actions or matters mentioned in the last four preceding Sections shall, unless otherwise advised by the Judge, be invested by the Registrar in his name as Registrar, within forty-eight hours of its payment into Court in a Post Office savings bank established in the town in which the Court is held, without restriction as to the amount and without the declaration required of a depositor in a savings bank, and no part of any money invested in a Post Office savings bank under this Act shall be paid out to any Registrar, except upon an authority addressed to the Postmaster General by the Treasury.

Any person deriving any benefit under any moneys paid into a Post Office savings bank under the provisions of this Act may, nevertheless, open an account in a Post Office savings bank, or in any other savings bank, in his own name, without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

And by Section 75 (2) proceedings under The Trustee Acts, 1850 and 1852, shall be taken in the Court within the district of which the persons making the application, or any of them, reside or resides.

(B) *As to County Courts in Ireland.*

The County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), confers jurisdiction on the Civil Bill Courts in Ireland. See Sections 33 (*b*) and (*i*), 34, 35, 36, 37, 38, 39, and 40 (*f*).

PART IV.

MISCELLANEOUS AND SUPPLEMENTAL.

Application to trustees under Settled Lands Acts of provisions as to appointment of trustees.

47. (1) All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of The Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement.

(2) This Section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the commencement of this Act.

(3) This Section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act, otherwise than under the provisions of The Conveyancing and Law of Property Act, 1881. 44 & 45 Vict. c. 41.

Section 47.—This Section replaces Section 17 of The Settled Land Act, 1890 (53 & 54 Vict. c. 69), such last-mentioned Section being repealed by the present Act.

The repealed Section was enacted for the purpose of meeting the case of *re* Wilcock, in which it was doubted whether Section 31 of The Conveyancing and Law of Property Act, 1881 (which Section is now repealed and replaced by the 10th Section of the present Act), applied to trustees appointed for the purposes of the Settled Land Acts.

Neither the tenant for life, nor a person who might become tenant for life, ought to be appointed a trustee of a settlement for the purposes of the Settled Land Act, for one of the duties of the trustees is to check the proceedings of the tenant for life (*re* Harrop's Trusts, 24 C. D. 717, 719); and on the same grounds the solicitor of the tenant

for life ought not to be appointed (Wheelwright *v.* Walker, 23 C. D. 752, 763; and *re* Kemp's Settled Estates, 24 C. D. 485). And it is undesirable that near relatives should be appointed trustees for the purposes of the Act, for there ought to be two independent trustees (*re* Knowles' Settled Estates, 27 C. D. 707; but see *re* Wells, 31 W. R. 764).

Sub-section 2.—It will be observed that the Section is to have a retrospective effect, and makes valid appointments, discharges, and retirements of trustees made under The Conveyancing Act, 1881, before this Act came into operation.

Trust estates not affected by trustee becoming a convict. 33 & 34 Vict. c. 23.

48. Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of The Forfeiture Act, 1870, vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict: provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee.

Section 48.—This Section replaces Sections 46 and 47 of The Trustee Act, 1850 (13 & 14 Vict. c. 60), which Sections are repealed by the present Act (*see* Section 51 and Schedule).

The repealed Sections were almost identical in their terms with Sections 3 and 5 of 4 & 5 William IV. c. 23, which Act was repealed by The Trustee Act, 1850.

By The Forfeiture Act, 1870 (33 & 34 Vict. c. 23), it is enacted that after the passing of that Act (4th July, 1870) no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in that Act shall affect the law of forfeiture consequent upon outlawry. By Section 9 the Crown is empowered to appoint an administrator of the convict's property, and the Act makes provision for the vesting of the convict's property in the administrator for all the convict's estate and interest therein, and also makes provision as to the mode in which such property is to be applied.

By Section 6 of The Forfeiture Act, 1870, the expression "convict," as used in the Act, is to be deemed to mean any person against whom, after the passing of the Act, judgment of death or penal servitude shall have been pronounced or recorded upon any charge of treason or felony.

Outlawry in civil proceedings is abolished by 42 & 43 Vict. c. 59, Section 3.

As to the power of the Court to appoint a new trustee in substitution for a trustee who is convicted of felony, and to make a vesting order on the appointment of such new trustee, see Sections 25, 26, and 32 of the present Act.

Indemnity.

49. This Act, and every order purporting to be made under this Act, shall be a complete indemnity to the Banks of England and Ireland, and to all persons for any acts done pursuant thereto; and it shall not be necessary for the Bank or for any person to inquire concerning the propriety of the order, or whether the Court by which it was made had jurisdiction to make the same.

Section 49.—This Section is supplemental to Sections 35 and 42 of the present Act, and in effect replaces 11 & 12 Vict. c. 68, 12 & 13 Vict. c. 74, and Section 7 of 15 & 16 Vict. c. 55.

Definitions.

50. In this Act, unless the context otherwise requires,—

"Bankrupt."

The expression "bankrupt" includes, in Ireland, insolvent:

"Contingent right."

The expression "contingent right," as applied to land, includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest, or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

"*Contingent right.*"—This definition is taken from the definition of "contingent right" in Section 2 of 13 & 14 Vict. c. 60, which definition

was in its turn taken from 8 & 9 Vict. c. 106, with the purpose, no doubt, of including all the estates and interests over which that Act gives a power of disposition.

"Convey" and "Conveyance."

The expressions "convey" and "conveyance" applied to any person include the execution by that person of every necessary or suitable assurance for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law to the validity of the conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of the Acts for abolition of fines and recoveries in England and Ireland respectively, and also including surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of the customary or copyhold land:

"*Convey*" *and* "*Conveyance.*"—See 13 & 14 Vict. c. 60, Section 2, and 44 & 45 Vict. c. 41, Section 2 (v.), Tenants-in-tail. So where there was an adult tenant for life with infant tenant-in-tail, a vesting order of the infant's estate with the consent of the tenant for life as protector to bar the entail will pass the estate (Powell *v.* Matthews, 1 Jur. N. S. 973). As to copyholds see Rowley *v.* Adams (14 Beav. 130).

"Devisee."

The expression "devisee" includes the heir of a devisee and the devisee of an heir, and any person who may claim right by devolution of title of a similar description:

"*Devisee.*"—See 13 & 14 Vict. c. 60, Section 2.

The expression "instrument" includes Act of Parliament: "Instrument."

"*Instrument.*"—See 44 & 45 Vict. c. 41, Section 2 (viii.).

The expression "land" includes manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land: "Land."

"*Land.*"—"Land," by The Interpretation Act, 1889, Section 3, includes messuages, tenements, and hereditaments, houses and buildings of *any tenure*, and in addition includes, when used in this Act, manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land. Leaseholds, consequently, would be within this definition, since it includes messuages, tenements, &c., *of any tenure*. And as "land" includes incorporeal hereditaments, it would, it is conceived, extend to rentcharges. See *re* Harrison, Seton, 4th edition, 516; and see also 13 & 14 Vict. c. 60, Section 2, and 44 & 45 Vict. c. 41, Section 2 (ii.) and (iv.).

The expressions "mortgage" and "mortgagee" include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee: "Mortgage" and "Mortgagee."

"*Mortgage*" and "*Mortgagee*" include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee. This definition may be compared with that contained in The Conveyancing and Law of Property Act, 1881, of "Mortgage," as it no doubt comprises the same extent of rights. In that Act "mortgage includes any charge on any property for securing money or money's worth; and mortgage means money or money's worth secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage according to

his estate, interest, or right in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee."

There appears to be no doubt that, according to the true interpretation of this Section, equitable mortgages are comprised in it. And see and compare 13 & 14 Vict. c. 60, Section 2.

"Pay" and "Payment." The expressions "pay" and "payment" as applied in relation to stocks and securities, and in connexion with the expression "into court" include the deposit or transfer of the same in or into court:

"*Pay*" *and* "*Payment.*"—These expressions occur in Section 42, dealing with "Payment into Court by Trustees." Trustees who have "money or *securities* belonging to a trust may pay the same into the High Court"; and by Sub-section 3 of the same Section the High Court "may order *payment* into Court"; and, as interpreted by this Section, the securities can, without change of investment, be deposited in Court, or transferred if they are in such investments as are authorised by law for trustees.

"Possessed." The expression "possessed" applies to receipt of income of, and to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in any land:

"*Possessed.*"—See and compare 13 & 14 Vict. c. 60, Section 2; and 44 & 45 Vict. c. 41, Section 2 (iii.)

"Property." The expression "property" includes real and personal property, and any estate and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not:

"*Property*" includes—(*a*) Real property; (*b*) Personal property; (*c*) Any estate and interest in any property, real or personal; (*d*) Any debt; (*e*) Any thing in action; (*f*) Any other right or interest, in possession or not.

Where the word "property" occurs in the Act, it must, however, be taken in conjunction with the context, and construed accordingly. In Section 5, Sub-section 1 (*a*), for instance, the word "property" apparently applies only to real estate.

This definition reproduces that contained in 44 & 45 Vict. c. 41, Section 2 (i.), and 45 & 46 Vict. c. 39, Section 1 (4) (i.).

It is scarcely necessary to further comment on the terms here used, except to say that a debt is a species of "things in action," and means the right of suing for money due.

By Sub-section 6 of Section 25 of 36 & 37 Vict. c. 66, any debt or legal chose in action is assignable by writing if the assignment is absolute, and express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action.

"Rights." The expression "rights" includes estates and interests:

"Securities." The expression "securities" includes stocks, funds, and shares; and, so far as relates to payments into court, has the same meaning as in The Court of Chancery (Funds) Act, 1872:*

"*Securities.*"—See and compare 44 & 45 Vict. c. 68, Section 2, and 35 & 36 Vict. c. 44.

"Stock." The expression "stock" includes fully paid-up shares; and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer

* Section 3 of this Act is as follows:—"The term 'Securities' includes Government securities, and any security of any foreign State, any part of Her Majesty's dominions out of the United Kingdom, or any body corporate or company, or standing in books kept by any body corporate, company, or person, in the United Kingdom, and all stocks, funds, and effects."

either alone or accompanied by other formalities, and any share or interest therein:

"*Stock.*"—See and compare 52 & 53 Vict. c. 32, Section 9, and 13 & 14 Vict. c. 60, Section 2.

The definition of "stock" with relation to vesting orders would apparently include shares in a joint stock banking company (*re* Angelo, 5 De G. & Sm. 278), and an annuity with a life assurance society (see *re* Tweedy, 28 C. D. 529, 531), and also shares in ships registered under The Merchant Shipping Act, 1854 (18 & 19 Vict. c. 91), Section 10.

"Transfer." The expression "transfer," in relation to stock, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee:

"*Transfer.*"—See and compare 13 & 14 Vict. c. 60, Section 2, and 15 & 16 Vict. c. 55, Section 6.

"Trust" and "Trustee." The expression "trust" does not include the duties incident to an estate conveyed by way of mortgage; but, with this exception, the expressions "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person.

"*Trust*" *and* "*Trustee.*"—The expression "Trustee" has for the purposes of the Act three meanings assigned to it, viz.:—

1. An Express Trustee.
2. Personal Representative: being—
   (*a*) An Administrator;
   (*b*) An Executor.
3. A Constructive or Implied Trustee.

These meanings are not rendered inapplicable merely by reason of the trustee having a beneficial interest in the trust property. But the words do not include the duties incident to an estate conveyed by way of mortgage. In *re* Osborn's Mortgage Trusts (L. R. 12 Eq. 392) a mortgage of realty was made to two persons, one of whom afterwards went abroad. Upon a sale of the mortgaged property by the mortgagor so much of the purchase-money as was payable to the mortgagees was invested in their joint names. The Court held it had no jurisdiction to make an order vesting in the purchaser the estate of the absent mortgagee. Lord Romilly said there were possibly two cases in which the Court might have authority under this Section (Section 10 of The Trustee Act, 1850, now replaced by Sections 26 and 32 of this Act) to appoint a person to convey the estate of a mortgagee who has been paid off. One is where the advance has been made out of trust funds, and a new trustee has been appointed in consequence of one of the former trustees being resident out of the jurisdiction. Another case is where two persons advance distinct sums out of their own moneys to make up one single sum: then if each were paid off and gave a receipt in full for all that was due to him, that might amount to a declaration that he was merely a trustee of the legal estate, and the Court might possibly make an order.

The case of *re* Walker's Mortgage Trusts was such a case as that contemplated in the first of the instances referred to by Lord Romilly in the above case. *Re* Underwood (3 K. & J. 745) is another case of a mortgage security being held by reason of its terms to create a trust. Locking *v.* Parker (8 Ch. 30) is the leading authority for the proposition that a mortgage even in the form of a trust for sale does not make the mortgagee a trustee in the ordinary sense for the mortgagor, though he may, after a sale, become trustee for him of the surplus proceeds of sale after paying off the incumbrances.

All the persons above mentioned in 1, 2, and 3 will accordingly have the powers and be entitled to the protection afforded by the Act, executors and administrators being placed on the same footing as trustees for the purposes of this Act.

What may be the exact meaning of "*a trustee whose trust arises by construction or implication of law*" will probably require judicial interpretation. Trusts are divided by Lewin (Lewin on Trusts, 9th edition, p. viii.) as follows:—

1. Trusts by Act of a Party.
2. Trusts by Operation of Law.

As to 1 (Trusts by Act of a Party), they are subdivided into—
(i.) Express Trusts.
(ii.) Implied Trusts.
Express Trusts are further subdivided into—
(*a*) Executed Trusts.
(*b*) Executory Trusts.
Executory Trusts again divide into—
(i.) Trusts in Marriage Articles.
(ii.) Trusts in Wills.
As to 2 (Trusts by Operation of Law), they are subdivided into—
(i.) Resulting Trusts.
(ii.) Constructive Trusts.
Resulting Trusts again are subdivided thus:—
(*a*) Legal Interest, but not the Equitable—
Disposed of—
(i.) By presumption of law.
(ii.) By force of words.
(*b*) Upon purchases in the names of third persons—
(i.) In the name of a stranger.
(ii.) In the name of a child.

The learned writer elsewhere defines an Implied Trust as "*one declared by a party not directly but only by implication,*" while Trusts by Operation of Law "*are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity*"; and divides them into—(1) Resulting Trusts, as where an estate is devised to A and his heirs upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; and (2) Constructive Trusts, which are trusts the Court elicits by a contruction put upon certain acts of parties, as when a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease. It seems clear, therefore, that if this division is adopted by the Courts, the Act will apply, amongst other cases, to the following constructive trusts: namely—Where a person holds property on a precatory trust; where a person agrees for valuable consideration to settle or sell a specific estate; where property, whether real (Dyer *v.* Dyer, White & Tudor's L. C. 203) or personal (Elrand *v.* Dyer, 2 Ch. Ca. 36), has been conveyed to others than, or jointly with, the person who has paid the purchase-money. The actual operation of the Act in some of these cases will, however, be small.

The following cases throw some light on the question:—

(i.) As to Stock or Shares.—In *re Angelo* (5 De G. & Sm. 278) the vendor of shares in a joint stock bank has, *after* the contract, been held a trustee; and see also Gardner *v.* Cowles (3 C. D. 304), *re* Findlay (32 C. D. 221 and 641), *re* Bradshaw (2 D. M. & G. 900), *re* Wood (3 De G. F. & G. 125), and *re* Davis (L. R. 12 Eq. 214).

(ii.) In cases relating to real estate it would appear that a vendor or his representative cannot be declared a trustee unless the right to specific performance has been settled by a decree, for the reason that there might always be a question whether the contract could be enforced by a suit for specific performance, and it would be extremely inconvenient to declare the vendor to be a trustee upon a petition on which that point could not be decided. If the purchase-money is paid to the vendor in his lifetime, he then becomes a trustee of the legal estate (*re* Wilkinson, 12 W. R. 522; *re* Jones, W. N. 1888, 217; *re* Carpenter, Kay, 418; *re* Colling, 32 C. D. 333; *re* Burt, 9 Hare, 289; *re* Taylor, W. N. 1866, 5; *re* Faulder, W. N. 1866, p. 83; *re* Lowry, 15 Eq. 78; Morgan *v.* Swansea Urban Sanitary Authority, 9 C. D. 582; *re* Badcock, 2 W. R. 386; Dewar *v.* Maitland, L. R. 2 Eq. 834; *re* Martin's Trust, 34 C. D. 619; *re* Pagani, 1892, 1 Ch. 236).

But The Law of Property Act, 1881, Section 4, renders this of little importance, as by it the personal representative of a deceased vendor can complete if the contract was enforceable at death of vendor (Lysaght *v.* Edwards, 2 C. D. 506).

(iii.) The owner of copyholds covenanting to surrender, and declaring that in the meantime he will stand seised upon trust for covenantee, is a trustee within the Act (*re* Collingwood's Trusts, 6 W. R. 536; Steele *v.* Walter, 28 Beav. 466; *re* Bradley's Settled Estate, 54 L. T., N. S. 43; *re* Wise, 5 De G. & Sm. 415; and *re* Cuming, L. R. 5 Ch. 72).

(iv.) An assignee in bankruptcy (*re* Joyce's Estate, L. R. 2 Eq. 576).

(v.) Case of a mortgagee (*re* Crowe's Mortgage, L. R. 13 Eq. 26).

51. The Acts mentioned in the Schedule to this Act are hereby repealed except as to Scotland to the extent mentioned in the third column of that Schedule. Repeal.

See the Table prefixed to this volume, page 1 *et seq.*, showing the corresponding Sections in this Act to the Acts repealed, and also Appendix I., where a Table will be found showing what Sections in the repealed Acts correspond to the Sections of this Act.

Extent of Act.

52. This Act does not extend to Scotland.

Short title.

53. This Act may be cited as The Trustee Act, 1893.

By The Interpretation Act, 1889, Section 35 (1), it is enacted: "In any Act, instrument, or document, an Act may be cited by reference to the short title, if any, of the Act, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed, and where there are more Statutes or Sessions than one in the same regnal year, by reference to the Statute or the Session, as the case may require, and where there are more chapters than one, by reference to the chapter, and any enactment may be cited by reference to the Section or Sub-section of the Act in which the enactment is contained."

Commencement.

54. This Act shall come into operation on the *First day of January One thousand eight hundred and ninety-four.*

This Section must, of course, be read subject to the express declaration in certain of the Sections that the Act applies to deeds, transactions, &c., which have taken place before the passing of it. The following is a list of the Sections which alter the date so fixed:—

By Section 4, Sections 1 to 3 inclusive, relating to investments, are to apply *as well to trusts created before as to trusts created after the passing of this Act.*

By Section 5 a trustee "*shall be deemed to have always had power to invest*" as therein mentioned.

The following Sub-sections also alter the date:—Section 8 (4), Section 9 (2), Section 10 (6), Section 11 (4), Section 12 (5), Section 13 (3), Section 14 (4), Section 17 (4), Section 18 (3), Section 19 (3), Section 20 (2), Section 21 (4), Section 22 (2), Section 45 (2), Section 47 (3).

As a general rule an Act of Parliament comes into effect on the beginning of the day on which it received the Royal Assent, unless there are words (as in the Sections above mentioned of The Trustee Act, 1893) expressly postponing that commencement.

SCHEDULE.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
36 Geo. III. c. 52 -	The Legacy Duty Act, 1796.	Section thirty-two.
9 & 10 Vict. c. 101 -	The Public Money Drainage Act, 1846.	Section thirty-seven.
10 & 11 Vict. c. 32 -	The Landed Property Improvement (Ireland) Act, 1847.	Section fifty-three.
10 & 11 Vict. c. 96 -	An Act for better securing trust funds, and for the relief of trustees.	The whole Act.
11 & 12 Vict. c. 68 -	An Act for extending to Ireland an Act passed in the last Session of Parliament, entitled "An Act for better "securing trust funds, "and for the relief of "trustees."	The whole Act.
12 & 13 Vict. c. 74 -	An Act for the further relief of trustees.	The whole Act.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
13 & 14 Vict. c. 60 -	The Trustee Act, 1850.	Sections seven to nineteen, twenty-two to twenty-five, twenty-nine, thirty-two to thirty-six, forty-six, forty-seven, forty-nine, fifty-four, and fifty-five; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
15 & 16 Vict. c. 55 -	The Trustee Act, 1852.	Sections one to five, eight, and nine; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
17 & 18 Vict. c. 82 -	The Court of Chancery of Lancaster Act, 1854.	Section eleven.
18 & 19 Vict. c. 91 -	The Merchant Shipping Act Amendment Act, 1855.	Section ten, except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
20 & 21 Vict. c. 60 -	The Irish Bankrupt and Insolvent Act, 1857.	Section three hundred and twenty-two.
22 & 23 Vict. c. 35 -	The Law of Property Amendment Act, 1859.	Sections twenty-six, thirty, and thirty-one.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
23 & 24 Vict. c. 38 -	The Law of Property Amendment Act, 1860.	Section nine.
25 & 26 Vict. c. 108 -	An Act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others.	The whole Act.
26 & 27 Vict. c. 73 -	An Act to give further facilities to the holders of Indian stock.	Section four.
27 & 28 Vict. c. 114 -	The Improvement of Land Act, 1864.	Section sixty, so far as it relates to trustees; and Section sixty-one.
28 & 29 Vict. c. 78 -	The Mortgage Debenture Act, 1865.	Section forty.
31 & 32 Vict. c. 40 -	The Partition Act, 1868.	Section seven.
33 & 34 Vict. c. 71 -	The National Debt Act, 1870.	Section twenty-nine.
34 & 35 Vict. c. 27 -	The Debenture Stock Act, 1871.	The whole Act.
37 & 38 Vict. c. 78 -	The Vendor and Purchaser Act, 1874.	Sections three and six.
38 & 39 Vict. c. 83 -	The Local Loans Act, 1875.	Sections twenty-one and twenty-seven.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
40 & 41 Vict. c. 59 -	The Colonial Stock Act, 1877.	Section twelve.
43 & 44 Vict. c. 8 -	The Isle of Man Loans Act, 1880.	Section seven, so far as it relates to trustees.
44 & 45 Vict. c. 41 -	The Conveyancing and Law of Property Act, 1881.	Sections thirty-one to thirty-eight.
45 & 46 Vict. c. 39 -	The Conveyancing Act, 1882.	Section five.
46 & 47 Vict. c. 52 -	The Bankruptcy Act, 1883.	Section one hundred and forty-seven.
51 & 52 Vict. c. 59 -	The Trustee Act, 1888.	The whole Act, except Sections one and eight.
52 & 53 Vict. c. 32 -	The Trust Investment Act, 1889.	The whole Act, except Sections one and seven.
52 & 53 Vict. c. 47 -	The Palatine Court of Durham Act, 1889.	Section eight.
53 & 54 Vict. c. 5 -	The Lunacy Act, 1890 -	Section one hundred and forty.
53 & 54 Vict. c. 69 -	The Settled Land Act, 1890.	Section seventeen.
55 & 56 Vict. c. 13 -	The Conveyancing and Law of Property Act, 1892.	Section six.

APPENDIX I.

TABLE SHOWING THE SECTIONS OF THE TRUSTEE ACT, 1893, AND THE SECTIONS TO WHICH THEY CORRESPOND IN THE REPEALED ACTS.

NOTE.—The Sections of The Trustee Act, 1850 (13 & 14 Vict. c. 60), and of The Trustee Act, 1852 (15 & 16 Vict. c. 55), marked thus (*), are still, unrepealed so far as relates to the Court exercising jurisdiction in Lunacy in Ireland.

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 1 - -	Authorised investments.	Section 3 -	The Trust Investment Act, 1889 (52 & 53 Vict. c. 32).
Section 2 - -	Purchase at a premium of redeemable stock.	Section 4 -	,, ,,
Section 3 - -	Discretion of trustee.	Section 5 -	,, ,,
Section 4 - -	Application of preceding Sections.	Section 6 -	,, ,,
Section 5 - -	Enlargement of express powers of investment:—	—	—
Section 5 (1) (*a*)	Investment on mortgage of long terms.	Sections 9 and 12.	The Trustee Act, 1888 (51 & 52 Vict. c. 59).
Section 5 (1) (*b*)	Power to invest in land improvement charges.	Section 60, so far as it relates to trustees.	The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114).

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 5 (2) -	Power to invest in debenture stock.	Sections 1 and 2.	The Debenture Stock Act, 1871 (34 & 35 Vict. c. 27).
Section 5 (3) -	Power to invest in debentures under Local Loans Act.	Section 27 -	The Local Loans Act, 1875 (38 & 39 Vict. c. 83)
Section 5 (4) -	Power to invest in securities of the Government of the Isle of Man.	Section 7, so far as it relates to trustees.	Isle of Man Loans Act, 1880 (43 & 44 Vict. c. 8).
Section 5 (5) -	Power to invest on mortgages under Mortgage Debenture Act.	Section 40 -	The Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78).
Section 6 - -	Power to invest notwithstanding drainage charges.	Section 37 -	The Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101).
,,	,, ,,	Section 53 -	Landed Property Improvement (Ireland) Act, 1847 (10 & 11 Vict. c. 32).
,,	,, ,,	Section 61 -	The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114).
Section 7 - -	Trustees, unless authorised, not to apply for or hold stock certificate to bearer.	Section 4 -	The India Stock Certificate Act, 1863 (26 & 27 Vict. c. 73).
,,	,, ,,	Section 29 -	The National Debt Act, 1870 (33 & 34 Vict. c. 71).
,,	,, ,,	Section 21 -	The Local Loans Act, 1875 (38 & 39 Vict. c. 83).

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 7 - -	Trustees, unless authorised, not to apply for or hold stock certificate to bearer.	Section 12 -	The Colonial Stock Act, 1877 (40 & 41 Vict. c. 59).
Section 8 - -	Loans and investments by trustees not chargeable as breaches of trust.	Section 4 -	The Trustee Act, 1888 (51 & 52 Vict. c. 59).
Section 9 - -	Liability or loss by reason of improper investments.	Section 5 -	,, ,,
Section 10 -	Power of appointing new trustees.	Section 31 -	The Conveyancing Act, 1881 (44 & 45 Vict. c. 41).
,,	Appointment of separate sets of trustees.	Section 5 -	The Conveyancing Act, 1882 (45 & 46 Vict. c. 39).
,,	,, ,,	Section 6 -	The Conveyancing Act, 1892 (55 & 56 Vict. c. 13).
Section 11 -	Retirement of trustees.	Section 32 -	The Conveyancing Act, 1881 (44 & 45 Vict. c. 41).
Section 12 -	Vesting of trust property in new or continuing trustees.	Section 34 -	,, ,,
Section 13 -	How power of sale may be exercised.	Section 35 -	,, ,,
Section 14 -	Depreciatory conditions of sale.	Section 3 -	The Trustee Act, 1888 (51 & 52 Vict. c. 59).
Section 15 -	Trustees, vendors, or purchasers may sell under conditions of Vendor and Purchaser Act, 1874.	Section 3 -	The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 16 -	Married woman as bare trustee may convey.	Section 6 -	The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).
Section 17 (1) to (4)	Power to authorise receipt of money by banker or solicitor as agent.	Section 2 -	The Trustee Act, 1888 (51 & 52 Vict. c. 59).
Section 17 (5) -	To what trusts Act is applicable.	Section 12 -	" "
Section 18 (1) and (2) - -	Trustees may insure buildings.	Section 7 -	" "
Section 18 (3) -	To what trusts Act is applicable.	Section 12 -	" "
Section 19 (1) and (2) - -	Trustees of renewable leasehold may renew and raise money for the purpose.	Sections 10 and 11.	" "
Section 19 (3) -	To what trusts Act is applicable.	Section 12 -	" "
Section 20 -	Trustees' receipts -	Section 36 -	The Conveyancing Act, 1881 (44 & 45 Vict. c. 41).
Section 21 -	Power of executors and trustees to compound, &c.	Section 37 -	" "
Section 22 -	Powers exerciseable by survivors of executors or trustees.	Section 38 -	" "
Section 23 -	Trustees exonerated in respect of certain acts and payments under powers of attorney.	Section 26 -	The Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35).

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 24 -	Implied indemnity of trustees.	Section 31 -	The Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35).
Section 25 (1) -	Power of Court to appoint new trustees.	Section 32 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	New trustees to have the same powers as if appointed by decree in a suit.	Section 33 -	,, ,,
,,	Power to Court to appoint a new trustee in the place of a convict.	Section 8 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
,,	Power to Court to appoint new trustee where there is no existing trustee.	Section 9 -	—
,,	Ireland: Power of Court to appoint new trustee in place of bankrupt or insolvent.	Section 322 -	The Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60).
,,	Court may appoint new trustee in the place of a trustee who is bankrupt.	Section 147 -	The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).
Section 25 (2) -	Old trustees not to be discharged from liability.	Section 36 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 26 -	Vesting Orders as to land:—	—	—

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 26 -	Vesting Orders in case of infant trustee or mortgagee of land, or contingent right in land.	Sections 7 and 8.	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	Orders as to estate, or contingent right of trustee or heir of trustee.	Sections 9, 10, 11, 12, 13, 14, and 15.	,, ,,
,,	Power to Court to vest lands in new trustee.	Section 34 -	,, ,,
,,	Vesting Order in case of refusal by trustee to convey.	Section 2 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
Section 27 -	Order as to contingent rights of unborn person.	Section 16 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 28 -	Vesting Order in place of conveyance by infant mortgagee.	Sections 7 and 8.	,, ,,
Section 29 -	Vesting Order in place of conveyance by heir or devisee of mortgagee.	Section 19 -	,, ,,
Section 30 -	Vesting Order where a decree is made for sale or mortgage of real estate for payment of debts.	Section 29 -	,, ,,
,,	,, ,,	Section 1 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
Section 31 -	Power of Court to declare parties to suit to be trustees.	*Section 30 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 31 -	Power of Court to declare parties to suit to be trustees.	Section 7 -	The Partition Act, 1868 (31 & 32 Vict. c. 40).
Section 32 -	Effect of Vesting Order.	Sections 7 to 15, 19, and 34.	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	,, ,,	Sections 1, 2, and 3.	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
Section 33 -	Power of Court to appoint a person to convey or transfer.	*Section 20 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 34 -	Effect of an Order vesting copyhold lands.	*Section 28 -	,, ,,
Section 35 (1) -	Vesting Orders as to stock, &c.	Sections 22, 23, 24, 25, and 35.	,, ,,
,,	,, ,,	Sections 3, 4, and 5.	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
Section 35 (2) -	Power to appoint a person to transfer.	*Section 20 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 35 (3) -	Effect of Order to transfer stock	*Section 26 -	,, ,,
,,	,, ,,	*Section 6 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
Section 35 (5) -	Power to give directions as to exercise of right to stock, &c.	*Section 31 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 35 (6) -	Shares in ships to be treated as if they were stock, for the purposes of a Vesting Order.	Section 10 -	Act to Amend The Merchant Shipping Act, 1854 (18 & 19 Vict. c. 91).†

† The Lunacy Act, 1890, Section 341, definition of "Stock," preserves the effect of the Section as to Vesting Orders in Lunacy made in England.

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 36 -	Persons entitled to apply for Vesting Orders.	*Section 37 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 37 -	Powers of trustees appointed by the Court.	Section 33 -	The Conveyancing Act, 1881 (44 & 45 Vict. c. 41).
Section 38 -	Power to charge costs of Order on trust estate.	*Section 51 -	The Trustee Act, 1850 13 & 14 Vict. c. 60).
Section 39 -	Vesting Orders as to charitable trusts.	*Section 45 -	" "
Section 40 -	Order made upon certain allegations to be conclusive evidence of the matters alleged upon any question as to the validity of the Order.	Section 140 -	The Lunacy Act, 1890 (53 Vict. c. 5).
"	" "	*Section 44 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 41 -	Application of Vesting Orders to land out of England.	Section 54 -	" "
Section 42 -	Payment into Court.	Section 32 -	Legacy Duty Act, 1796 (36 Geo. III. c. 52).
"	" "	Sections 1 & 2	Trustee Relief Act, 1847 (10 & 11 Vict. c. 96).
"	" "	The whole Act	Trustee Relief (Ireland) Act, (11 & 12 Vict. c. 68).
"	" "	Section 1 -	Act for the Further Relief of Trustees (12 & 13 Vict. c. 74).
"	" "	*Section 48 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 43 -	Court may make Order in the absence of a trustee.	Section 49 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 44 -	Trustees with sanction of the Court may dispose of land and minerals separately.	Section 2 -	Act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others (25 & 26 Vict. c. 108).
Section 45 -	Making beneficiary indemnify for breach of trust.	Section 6 -	The Trustee Act, 1888 (51 & 52 Vict. c. 59).
Section 46 -	Jurisdiction in case of lands in Lancaster or Durham.	* Section 21 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
"	" "	Section 11 -	Court of Chancery, Lancaster, Act, 1854 (17 & 18 Vict. c. 82).
"	" "	Section 8 -	Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47).
Section 47 -	Application to trustees under the Settled Land Acts of provisions for the appointment of new trustees.	Section 17 -	Settled Land Act, 1890 (53 & 54 Vict. c. 69).
Section 48 -	Trust estates not affected by trustee becoming a convict.	Sections 46 and 47.	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 49 -	Indemnity - -	Section 3 -	Trustee Relief (Ireland) Act (11 & 12 Vict. c. 68).
"	" "	Section 1 -	Act for the Further Relief of Trustees (12 & 13 Vict. c. 74).
"	" "	Section 7 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).

Sections of Trustee Act, 1893.	Subject Matter	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 50 -	*Definitions :—*		
„	"Bankrupt" - -	*Section 2 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
„	"Convey" and "Conveyance."	„	„ „
„	"Devisee" - -	„	„ „
„	"Instrument" -	Section 9 -	Trustee Investment Act, 1889 (52 & 53 Vict. c. 32).
„	"Land" - - -	*Section 2 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
„	"Mortgage" and "Mortgagee."	„	„ „
„	"Possessed" - -	„	„ „
„	"Stock" - - -	Section 9 -	Trustee Investment Act, 1889 (52 & 53 Vict. c. 32).
„	"Transfer" - -	*Section 2 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
„	„ „	*Section 6 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
„	"Trust" - - -	Section 2 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 52 -	Extent of Act - -	Section 54 -	„ „
„	„ „	Section 2 -	Trustee Investment Act, 1889 (52 & 53 Vict. c. 32).

APPENDIX II.

FORMS FOR USE UNDER THE TRUSTEE ACT, 1893.

No. 1.

TESTATUM OF DEED OF APPOINTMENT OF NEW TRUSTEES. [See Section 10 (1) of the Act.]

Now this Indenture witnesseth that, in exercise of the power for this purpose given to him by The Trustee Act, 1893, and of every other power enabling him, the said [*appointor*] hereby appoints the said [*new trustee*] to be a trustee of the said [*will* or *indenture dated, &c.*, as the case may be] in the place of the said [*deceased* or *retiring trustee*], and jointly with the said [*continuing trustee*], for all the purposes of the said [*will* or *indenture dated, &c.*, as the case may be].

No. 2.

TESTATUM OF DEED OF APPOINTMENT OF NEW TRUSTEES where a Separate Set of Trustees is Appointed for a Part of the Trust Property held on trusts distinct from those relating to any other part. [See Section 10 (2) (*b*) of the Act.]

[Same as No. 1, and add] except as regards the [*share directed to be held on separate trusts*] by the said [*will* or *indenture dated, &c.*] directed to be held in trust for the said [A. B.].

And this Indenture also witnesseth that the said [*appointor*], in exercise of the power for this purpose given to him by The Trustee Act, 1893, and of every other power enabling him, hereby appoints the said [*new separate trustees*] to be trustees of the said [*will* or *indenture dated, &c.*, as the case may be], so far as regards [*the share directed to be held on separate trusts*] directed to be held in trust for [C. D., *beneficiary of separate trusts*].

No. 3.

VESTING DECLARATION in Deed of Appointment of New Trustees, Vesting Land, Chattels, and the Right to Recover Choses in Action the Subject of the Trust. [See Section 12 (1) of the Act.]

And this Indenture further witnesseth that the said [*appointor*], with the assent of the said [*continuing trustees*], hereby declares that all the estate and interest of the said [*old and continuing trustees*] in the [*land*] and hereditaments now subject to the trusts of the said [*will* or *indenture dated, &c.*] shall forthwith vest in the said [*new and continuing trustees*] as trustees of the said [*will* or *indenture dated, &c.*, as the case may be], for the purposes and upon the trusts thereof.

And this Indenture also witnesseth that the said [*appointor*], with the assent of the said [*continuing trustees*], hereby declares that all chattels and also the right to recover and receive all debts and other things in action subject to the trusts of the said [*will* or *indenture dated, &c.*] shall forthwith vest in the said [*new and continuing trustees*], and as joint tenants for the purposes and upon the trusts thereof.

No. 4.

RECITAL OF DESIRE BY A TRUSTEE TO BE DISCHARGED, and Vesting Declaration, Vesting Land, Chattels, and the Right to Recover Debts and Things in Action in Continuing Trustees Alone. [See Section 11 and Section 12 (2) of the Act.]

Recital of Desire to be Discharged.

And whereas the said [*retiring trustee*] is desirous of being discharged from the trusts of the said [*will* or *indenture*, as the case may be] :

Now this Indenture witnesseth that [*retiring trustee*] hereby declares that he is desirous of being discharged from the trusts of the said [*will* or *indenture*, &c.].

Consent to Discharge.

And this Indenture further witnesseth that the said [*persons (if any) empowered to appoint trustees and continuing trustees*] hereby consent to the discharge of the said [*retiring trustee*] from the trusts aforesaid, and to the vesting in [*continuing trustees*] alone of the trust property.

Vesting Declaration of Land.

And this Indenture also witnesseth that the said [*appointor*] doth hereby declare that all the estate and interest of the said [*retiring and continuing trustees*] and each of them in the [*land*] and hereditaments now subject to the trusts of the said [*will* or *indenture dated*, &c., as the case may be] shall forthwith vest in the said [*continuing trustees*] alone, as joint tenants for the purposes and upon the trusts thereof.

Vesting Declaration of Chattels and Choses in Action.

And this Indenture also witnesseth that the said [*appointor*] doth hereby declare that all chattels, and also the right of the said [*retiring and continuing trustees*] to recover and receive all debts and things in action, subject to the trusts of the said [*will* or *indenture dated, &c.*], shall forthwith vest in the said [*continuing trustees*] alone as trustees of the said [*will* or *indenture dated, &c.*], and as joint tenants for the purposes and upon the trusts thereof.

No. 5.

ORIGINATING SUMMONS for Appointment of New Trustees, and Vesting Order as to Land, Stock, and Choses in Action. [See Sections 25, 26, and 35 of the Act, and R. S. C., Order 55, Rule 13 (*a*).]

IN THE HIGH COURT OF JUSTICE, [*Reference to Record.*]

CHANCERY DIVISION.

MR. JUSTICE [ ].

In the Matter of the Trusts of [*an Indenture of Settlement dated, &c., and made between, &c.*, or *the Will of* [A. B.] dated, &c.]

and

In the Matter of The Trustee Act, 1893.

Let the Respondent [C. D.] attend at the Chambers of Mr. Justice [ ] at the Royal Courts of Justice, Strand, at the time specified in the margin hereof, upon the application, under Order 55, Rule 13 (*a*), of the Rules of the Supreme Court, of [E. F.], being respectively [*trustees* or *beneficiaries*] under the said [*will* or *settlement*].

1. That [G. H.], of [ ], in the County of [ ], and [I. J.], of [ ], in the County of [ ], may be appointed Trustees of the said [*will* or *indenture of settlement*] in the place of [*old trustee*] and [*old trustee*] respectively, deceased.

2. That the messuages, tenements, lands, and hereditaments situate in [*place*] now subject to the trusts of the said [*will* or *indenture of settlement*] and all other (if any) the lands and hereditaments so subject may vest in the said [G. H.] and [I. J.] as such Trustees as aforesaid for the estate and interest therein now vested in the said [ ].

3. That the right to call for a transfer of, and to transfer into their own names, the sum of [ ] subject to the trusts of the said [*will* or *settlement*] and to receive the dividends now due and to accrue due thereon may be vested in the said [G. H.] and [I. J.] as the Trustees thereof.

4. That the right to sue for and recover any chose in action subject to the trusts of the said [*will* or *settlement*] may vest in the said [G. H.] and [I. J.] as such Trustees of the said [*will* or *settlement*].

5. That the costs of this application may be provided for.

Dated, &c.

Note.—The Order to be made on this Summons is sought under Sections [ ] of The Trustee Act, 1893.

This Summons was taken out by [ ].

To the above-named [ ].

Note.—If you do not attend, either in person or by your solicitor, at the time and place above mentioned, such Order will be made and proceedings taken as the Judge may think just and expedient.

Before you will be heard in Chambers you will have to enter an appearance in the Central Office, and give notice of such appearance.

No. 6.

CONSENT OF NEW TRUSTEES TO ACT, AND VERIFICATION OF SIGNATURE.

[*Title and Reference to Record.*]

We, , do hereby consent to act as Trustees under the .

Dated, &c.

(Signed)

I [ ], of [ ], in the County of [ ], Solicitor, hereby certify that the above-written signatures are the signatures of [ ] and [ ], the persons mentioned in the above-written Consent.

(Signed)

No. 7.

AFFIDAVIT OF FITNESS OF PROPOSED TRUSTEES.*

Filed . [*Title and Reference to Record.*]

I [ ], of [ ], make oath and say as follows:—

1. I have for [ ] years last past known and been well acquainted with [ ], of [ ], and [ ], of [ ], the persons proposed to be appointed new trustees of the will of [ ], late of [ ], deceased, the testator in the summons in the above matter mentioned.

2. The said [ ] has for [ ] years last past carried on business as a [ ] at [ ],

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* As to number of Affidavits required see *re* Arden, W. N. 1887, page 166. As to contents of Affidavits see *re* Castle, Sterry's Trust, W. N. 1888, page 179.

in the [*city* or *county*] of [ ]. The said [ ] has for [ ] years past carried on business as a [ ] at [ ], in the [*city* or *county*] of [ ].

3. During my acquaintance with them I have had many opportunities of forming an opinion as to their habits of business and integrity. The said [ ] and [ ] respectively are persons in good credit in the neighbourhood in which they respectively carry on business as aforesaid, and are both men of business habits and of strict honour and integrity.

4. In my judgment and opinion the said [ ] and [ ] are fit, proper, and eligible persons to be appointed new trustees of the said will.

Sworn, &c.

This Affidavit is filed, &c.

No. 8.

NOTICE under R. S. C., Order 16, Rules 48 and 55, and Section 45 of The Trustee Act, 1893, by a Trustee Defendant, for Contribution from, or Indemnity by, a Beneficiary who has Instigated or Consented to a Breach of Trust.

IN THE HIGH COURT OF JUSTICE, [*Reference to Record.*]
CHANCERY DIVISION.
MR. JUSTICE [ ]

Between A. B. - - *Plaintiff*,
and
C. D. and
E. F. - - *Defendants.*

Notice filed 189 .

To [*the Defendant C. D.* or *X. Y.*, *if not a party to the action.*]

[If addressed to a person not party to the action, *Take notice that this Action has been brought by the Plaintiff against the Defendants as Trustees under, &c., for breach of trust*, or as the case may be.]

The defendant E. F. claims to be [*entitled to contribution from you to the extent of* [ ] *of any sum which the plaintiff may recover against him on the ground that you are, &c.*], or [*indemnified by you against the claim for the said breach of trust and costs on the ground that you are a beneficiary under the said, &c., and that the investment was made at your instigation* (or, *with your consent in writing*)].

And take notice that if you wish to dispute the plaintiff's claim in this action as against the defendant [ ], or your liability to the defendants [ ], you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing you will be deemed to admit the validity of any judgment obtained against the defendant [ ], and your own liability to contribute or indemnify to the extent herein claimed, which may be summarily enforced against you pursuant to the Rules of the Supreme Court, 1883, Order xvi., Part vi.

(Signed)

or

[Solicitor for .]

Appearance to be entered at

No. 9.

PETITION FOR VESTING COPYHOLDS IN NEW TRUSTEES.
[See Section 12 (3) and Section 34 of the Act.]

IN THE HIGH COURT OF JUSTICE, [*Reference to Record.*]
CHANCERY DIVISION.
MR. JUSTICE [ ].

In the Matter of the Trusts of the Will of [*A. B.*]

and

In the Matter of The Trustee Act, 1893.

To Her Majesty's High Court of Justice.

The Humble Petition of [*C. D.*] showeth as follows:—

1. [*State will of testatrix, devising copyholds to trustees.*]

2. [*Death of testatrix and probate of will.*]

3. [*Death of a trustee.*]

4. [*Death of surviving trustee and grant of letters of administration.*]

5. The said E. F. [*last surviving trustee*] left him surviving as his customary heir-at-law according to the custom of the Manor of [ ], wherein the said copyhold estate of the testatrix is situate, and which was vested in the said [*trustees*] as trustees of the said will, his [*nephew*, or as the case may be] F. G.

6. The said copyhold estate of the testatrix, subject to the trusts of the said will herein set forth, now consists of

[*state particulars*], and your Petitioner is advised and submits that the said copyhold estate upon the decease of the said [*trustee*] intestate as aforesaid became and now is vested in the said [F. G.] as such customary heir-at-law upon the trusts of the said will.

7. The said [F. G.] has for some time past been and is now resident out of the jurisdiction of this Honourable Court, and is of unsound mind not so found, and has for some time past been and is now confined in the [*asylum*].*

8. [*State appointment by deed of new trustees of the will and the vesting in them of freeholds.*]

9. Under the circumstances hereinbefore set forth, it is necessary and expedient that a vesting order should be made by this Honourable Court vesting in the said [*new trustees*] as such trustees the said copyhold hereditaments for such estate and interest as the said [*original trustees*] if living would have, or as the said [F. G.] the customary heir-at-law of the said [*last surviving trustee*] now has therein.

Your Petitioner therefore humbly prays that the said copyhold messuages or tenements and orchard devised by the will of the testatrix to the said [*old trustees*], or other the copyhold messuages or tenements now subject to the trusts of the said will of the testatrix [ ], may vest in the said [*new trustees*] as joint tenants as trustees of the said will, and upon the trusts therein declared concerning the same, for such estate and interest as the said [*old trustees*], if living, would have, or as the said

* This allegation obviates service on F. G. (see *re* East, 8 Ch. 735, and *re* Green, 10 Ch. 272).

[F. G.], the customary heir-at-law of the said [*last surviving trustee*] deceased, now has therein.

Or that such other order may be made in the premises as to this Honourable Court shall seem meet.

And your Petitioner will ever pray, &c.

It is intended to serve this Petition on the said [*new trustees*].

No. 10.

AFFIDAVIT BY TRUSTEE on Payment into Court of Money or Securities belonging to a Trust. [See Section 42 of the Act.]

IN THE HIGH COURT OF JUSTICE,

CHANCERY DIVISION.

In the Matter of [*the trusts of the will of, &c.*, or *the trusts of a sum of £ bequeathed, &c.*]

and

In the Matter of The Trustee Act, 1893.

I [A. B.], of [ ], make oath and say as follows:—

1. The office of [ ], situate at [ ], in the [*county*] of [ ], is the place where I am to be served with any petition, summons, or order, or with notice of any proceeding relating to the trust fund hereinafter mentioned.

2. Under the provisions of the above-mentioned Act, I propose to pay and transfer into Court the funds mentioned in the Schedule hereto to the credit in the said Schedule mentioned.

3. [*State will or other document, &c., under which the trust arose.*]

4. The said [*testatrix*] died on the [ ] day of [ ] without having altered or revoked her said will, and the same was duly proved on the [ ] day of [ ], by [ ], in the Principal Registry of Her Majesty's Court of Probate.

5. On the [ ] day of [ ] I and the said [ ] set apart out of the assets of the said [ ] the sum of £ to answer the said [*legacy*] to the said [ ], and invested such sum in the purchase in our joint names of the sum of £ .

6. [*State decease or otherwise of other trustees.*]

7. I have received the sum of £ for the half-year's interest which accrued due on the said annuities on the [ ] day of [ ], and after deducting and retaining thereout the sum of £ for the costs of paying and transferring the said trust fund into Court there remains the sum of £ cash, and which sums of £ and £ cash I propose to transfer and pay into Court as in the said Schedule hereto stated.

[To the best of my knowledge and belief, the only persons interested in or entitled to the said sums of £ and £ cash are .*

8. I submit to answer all such inquiries relating to the application of the said sums of £ and £ cash as this Court, or any Judge thereof at Chambers, may think proper to make or direct.

Sworn, &c.

* It is not necessary now to state these particulars (see *re* Graham's Trusts, 1891, 1 Ch. 151).

LODGMENT SCHEDULE.

IN THE HIGH COURT OF JUSTICE,
CHANCERY DIVISION.

Filed , 189 .

Ledger Credit { In the Matter of the Trusts of the Sum of £ bequeathed by the will of [ ] in favour of [ ] subject to legacy duty.

Particulars of Funds to be lodged.	Name and Address of Person to make lodgment.	Amounts.	
		Money.	Securities.
[Consols] Cash No part of the legacy duty has been paid [*or* all the legacy duty has been paid]. It is desired that the above sum of cash, and the dividends to accrue on the above annuities, may be invested in like annuities and accumulated [*or* It is deemed unnecessary to invest the above sum of cash and the dividends on the above annuities].	of in the County of		

No. 11.

DIRECTION FOR LODGMENT OF GOVERNMENT SECURITIES.

Ledger Credit, [Fol.] *Re* Trusts of the Sum of £ bequeathed by the Will of [ ] in favour of [ ] (subject to legacy duty).

To The Governor and Company of the Bank of England.

PAY OFFICE, ROYAL COURTS OF JUSTICE,

189 .

Authority is hereby given for the transfer by [ ] to the account of the Paymaster-General for and on behalf of the Supreme Court of Judicature of the sum of £ per centum annuities, such transfer being made pursuant to The Trustee Act, 1893, and an affidavit filed the day of

(Signed)

No. 12.

CERTIFICATE OF TRANSFER.

To The Assistant Paymaster-General.

BANK OF ENGLAND,

189 .

The above-mentioned securities have been this day transferred to the account of the Paymaster-General.

For The Governor and Company of the Bank of England,

(Signed)

No. 13.

FORM OF PETITION by Trustees for the Sanction of the Court to a Disposition of Land and Minerals Separately.

[See Section 44 of the Act.]

IN THE HIGH COURT OF JUSTICE,

CHANCERY DIVISION.

[*Name of Judge.*]

In the Matter of the Trusts of an Indenture of Settlement dated, &c. [or *of the Will of A., deceased*, or as the case may be],

and

In the Matter of The Trustee Act, 1893.

To Her Majesty's High Court of Justice.

The Humble Petition of [*A. B., of, &c.*] and [*C. D., of, &c.*]

Showeth as follows :—

1. [*State the settlement or other instrument referred to in the title, showing that the petitioners have authority to dispose of the land, and that there is no provision in such settlement or other instrument forbidding the disposition of the mines and minerals separately from the surface.*]

2. [*State facts showing that a separate disposition of surface and minerals would be to the advantage of the persons beneficially entitled.*]

Your Petitioners therefore humbly pray that your Petitioners, or the survivor of them, or other the trustees or trustee for the time being of

the said Indenture of Settlement of the day of 18 [or as the case may be] may be at liberty to exercise all or any of the trusts, powers, and authorities of the said Indenture [or as the case may be], so as to dispose of the lands and hereditaments now held under and subject to the trusts of the said Indenture [or as the case may be], with an exception or reservation of the mines and minerals in and under the same, and with or without rights and powers incidental to the working, getting, and carrying away of such minerals, and so as to dispose of such mines and minerals, with or without such rights or powers as aforesaid, separately from the residue of the said lands and hereditaments, and in either case without prejudice to any future exercise of the said trusts, powers, and authorities with respect to the excepted mines and minerals or the undisposed-of land.

Or that such other Order may be made in the premises as to your Lordship shall seem meet.

And your Petitioners will ever pray, &c.

NOTE.—It is intended to serve this Petition, &c.

[As to the persons to be served with this Petition see Daniell's Chancery Practice, 6th edition, pages 2,236 and 2,237.]

FORMS NOS. 14, 15, 16, 17, 18, AND 19, BEING FORMS UNDER THE RULES OF THE SUPREME COURT, NOVEMBER, 1893, AND THE RULES OF THE SUPREME COURT (TRUSTEE ACT), 1893.

As this work is passing through the press the Rules of the Supreme Court, November, 1893, and the Rules of the Supreme Court (Trustee Act), 1893, have been published. The Rules of the Supreme Court (Trustee Act), 1893, are given below *in extenso*, as well as the Forms forming Appendix K to the Rules of the Supreme Court, November, 1893, but adapted to applications to the Court relating to trusts, the subject of this book. Form No. 15 should be used in lieu of Form No. 5, given at p. 180 of this work, where applications are made under Sections 25, 26, and 35 of The Trustee Act, 1893, and generally in all applications not *inter partes* thereunder; otherwise Form 14 should be adopted.

As to Payment into Court.

The practice, on payment into Court of trust funds (Section 42 of The Trustee Act, 1893) has, by R. S. C. (Trustee Act), 1893, Order 54B, Rule 4, been assimilated to what it was previously to the case of *re* Graham's Trusts [1891], 1 Ch. 151 (cited on pp. 134 and 188, *ante*), and a trustee paying trust funds into Court will have to state in his affidavit to the best of his knowledge and belief the names of the persons interested in and entitled to the money or securities, and their places of residence. Form 10, p. 187, will be the proper one to use; but the foot-note on p. 188, referring to *re* Graham's Trusts, should be disregarded, and the affidavit will, as in the form in question, state the names and addresses of persons interested in the fund to be paid

in, to the best of the trustee's knowledge and belief. The statement of the practice as to this point on pp. 133 and 134 of this book should be modified accordingly. Service of notice of the lodgment in Court will also have to be made on the persons stated in the trustee's affidavit as interested in, or entitled to, the trust funds lodged in Court, contrary again to the practice laid down in the case just cited.—R. S. C. (Trustee Act), 1883, Order 54B, Rule 4 (2) (*a*).

As to Form of Applications.

Under the Rules of the Supreme Court (Trustee Act), 1893, all proceedings under The Trustee Act, 1893, are assigned to the Chancery Division [R. S. C. (Trustee Act), 1893, Order 54B, Rule 1], and all applications under the Act may be made by *petition, except as otherwise provided under Order* 55. The formal parts of a petition under the Act are given in Form 9, p. 185, and Form 13, p. 191, *ante.*

By Order 54B, Rule 5, R. S. C. (Trustee Act), 1893, the former R. S. C. Order 55, Rule 13A, is repealed and re-enacted with important extensions. Applications under it will in future be by summons. The formal parts of Forms 14 and 15 will be the correct forms to use—Form 14 where the application is not under The Trustee Act, 1893, and is *inter partes;* Form 15 where the application is under the Act itself, and is not *inter partes.*

The following are the applications which may now be made by summons under Order 55, Rule 13A:—

(A) *An application for appointment of a new trustee with or without a vesting or other consequential order.*

This will be the procedure under Sections 25, 26, and 35 of The Trustee Act, 1893.

This is a re-enactment of the former Order 55, Rule 13A. The following heads, (B) (C) and (D), are extensions of that Rule. Form 15 is the appropriate one to be used.

(B) *An application for a vesting order or other order consequential on the appointment of a new trustee, whether the appointment is made by the Court or Judge, or out of Court.*

The latter part of this is new, and remedies a serious defect in the former Order 55, Rule 13A, under which it was decided, in *re* Peach, 33 Sol. Jo. 575, and *re* Trubee, 36 Sol. Jo. 503, that where trustees have been appointed out of Court a vesting order could only be obtained on petition. The law, as laid down in *re* Higginbottom [1892], 3 Ch. 132, that the Court has no jurisdiction to appoint new trustees where there is a person able and willing to appoint, is not altered; but where property cannot be vested by a vesting declaration out of Court, application can now be made by originating summons for a vesting order. Thus an application to vest copyholds under Section 12 (3) and Section 34 of The Trustee Act, 1893, should be made by summons and not by petition, and Form 9, p. 185, is therefore inappropriate.

Form 15 is the appropriate form for applications under this head of the Rule.

(C) *An application for a vesting or other consequential order in any case where a judgment or order has been given or made for the sale, conveyance, or transfer of any land or stock.*

This is practically an extension of R. S. C. Order 55, Rule 1, but giving the power to make a consequential

vesting order on summons where there has been a judgment for sale, conveyance, or transfer of land or stock.

(D) *An application relating to a fund paid into Court in any case where the money or securities in Court does or do not exceed* £1,000, *or* £1,000 *nominal value.*

This is supplemental to R. S. C. Order 55, Rule 2 (2), and is a useful extension of the precedure by summons.

Form 15 will be the form to use under this head of the Rule.

Under the R. S. C., November, 1893, an originating summons can be served out of the jurisdiction, thus altering materially the practice as laid down in *re* Busfield, Whaley *v.* Busfield, 32 C. D. 123. This is a very important extension of the procedure, which will be of great use in questions of trusts. The new Rules specially dealing with originating summonses are R. S. C., November, 1893—Order 11; Order 13, Rule 15; Order 54, Rule 4B; Order 54, Rule 4C; Order 54, Rule 4D; Order 54, Rule 4F; Order 54A; and Order 65, Rules 14A and 14B (the last two dealing with costs). See *Weekly Notes*, *December* 9, 1893, for these Orders.

RULES OF THE SUPREME COURT (TRUSTEE ACT), 1893.

ORDER LIVB.—PROCEEDINGS UNDER THE TRUSTEE ACT, 1893.

1. [*Chancery Division.*]—All proceedings in the High Court commenced under The Trustee Act, 1893 (in this Order called "the Act"), shall be assigned to the Chancery Division of the Court.

2. [*Petition.*]—All applications under the Act may be made by petition except as otherwise provided under Order LV.

3. [*Section* 44.]—An application under Section 44 of the Act may be made by the trustees authorised to dispose of the land as in the said Section mentioned.

4. [*Lodgment under Section* 42.]—(1) Where a trustee desires to make a lodgment in Court under Section 42 of the Act he shall make and file an affidavit intituled in the matter of the trust (described so as to be distinguishable), and of the Act, and setting forth:

(*a*) A short description of the trust and of the instrument creating it.

(*b*) The names of the persons interested in and entitled to the money or securities, and their places of residence, to the best of his knowledge and belief.

(*c*) His submission to answer all such inquiries relating to the application of the money or securities paid into Court as the Court or Judge may make or direct.

(*d*) The place where he is to be served with any petition, summons, or order or notice of any proceeding relating to the money or securities.

Provided that if the fund consists of money or securities being, or being part of, or representing a legacy or residue to which an infant or person beyond the seas is absolutely entitled, and on which the trustee has paid the legacy duty, or on which no duty is chargeable, the trustee may make the lodgment (without an affidavit) on production of the Inland Revenue certificate in manner prescribed by the Supreme Court Funds Rules for the time being in force.

(2) Where the lodgment in Court is made on affidavit—

(*a*) The person who has made the lodgment shall forthwith give notice thereof, by prepaid letter through the post, to the several persons whose names and places of residence are stated in his affidavit as interested in or entitled to the money or securities lodged in Court;

(*b*) No petition or summons relating to the money or securities shall be answered or issued unless the petitioner or applicant has named therein a place where he may be served with any petition or summons, or notice of any proceeding or order relating to the money or securities or the dividends thereof;

(*c*) Service of any application in respect of the money or securities shall be made on such persons as the Court or Judge may direct.

5. Order LV., Rule 13A, is hereby repealed, and the following Rule shall be substituted therefor:—

ORDER LV., RULE 13A.

[*Summons.*]—Any of the following applications under The Trustee Act, 1893, may be made by summons:—

(*a*) An application for the appointment of a new trustee with or without a vesting or other consequential order.

(*b*) An application for a vesting order, or other order consequential on the appointment of a new trustee, whether the appointment is made by the Court or Judge, or out of Court.

(*c*) An application for a vesting or other consequential order in any case where a judgment or order has been given or made for the sale, conveyance, or transfer of any land or stock.

(*d*) An application relating to a fund paid into Court in any case where the money or securities in Court does or do not exceed £1,000, or £1,000 nominal value.

6. [*Repeal.*]—The following Rules are hereby repealed:—

Order LII. Rules 19, 20, 21, 22.

Order LV. Rule 2 (4), (5), (8).

Chancery Funds Amended Orders, 1874. Orders 5, 6, 7, 8, 9, and 10.

7. [*Citation*].—These Rules may be cited as the "Rules of the Supreme Court (Trustee Act), 1893," and each Rule may be cited separately according to the heading thereof with reference to the Rules of the Supreme Court, 1883. They shall come into operation on the First day of January, 1894.

December 5th, 1893.

The following forms are those given in the R. S. C., November, 1893, as Appendix K to the Rules of the Supreme Court, but adapted to questions relating to trusts, the subject of this book :—

No. 14.

GENERAL FORM of Originating Summons. (Ord. 54, R. 4B.)

[This form should be used in applications under R. S. C. Order 55, Rule 3.]

IN THE HIGH COURT OF JUSTICE, [*Reference to Record.*]
CHANCERY DIVISION.
MR. JUSTICE [ ].

*

Between A. B. - - *Plaintiff*,

and

C. D. - - *Defendant*.

Let [ ], of [ ], in the County of [ ], within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of [ ], of [ ], in the county of [ ], who claims to be [*state the nature of the claim*], for the determination of the following questions :—[*State the questions.*]

Dated the [ ].

This summons was taken out by [ ], solicitor for the above-named [ ].

* If the question to be determined arises in the administration of an estate or a trust, entitle it also in the matter of the estate or trust.

The defendant may appear hereto by entering appearance either personally or by solicitor at the Central Office, Royal Courts of Justice.

Note.—If the defendant does not enter appearance within the time and at the place above mentioned, such order will be made and proceedings taken as the Judge may think just and expedient.

No. 15.

ORIGINATING SUMMONS not *inter partes*. (Ord. 54, R. 4B.)

[This form should be used in lieu of that given at page 180 of this work, where applications are made under Sections 25, 26, and 35 of The Trustee Act, 1893, and, so far as the formal parts of it are concerned, generally in all applications not *inter partes* thereunder.]

IN THE HIGH COURT OF JUSTICE, [*Reference to Record.*]
CHANCERY DIVISION.
MR. JUSTICE [ ].

In the matter of the Trusts of [*an Indenture of Settlement dated &c., made between &c.*, or *the Will of* (*A. B.*) *dated &c.*]

and

In the Matter of The Trustee Act, 1893.

Let [ ], of [ ], within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application [*under Order* 55, *Rule* 13*a*, *of the Rules of the Supreme Court*, or as the case may be] of [E. F., of in the County of] [*being respectively trustees or beneficiaries under the said Will or Settlement*] for an Order

1. That [G. H.] of [ ] in the County of [ ], and [I. J.] of [ ] in the County of [ ], may be appointed trustees of the said [*Will or Indenture of Settlement*] in the place of [*old trustee*] and [*old trustee*] respectively deceased.

2. That the messuages, tenements, lands, and hereditaments situate in [*place*] now subject to the trusts of the said [*Will or Indenture of Settlement*], and all other (if any) the lands and hereditaments so subject, may vest in the said [G. H.] and [I. J.] as such trustees as aforesaid for the estate and interest therein now vested in the said [ ].

3. That the right to call for a transfer of and to transfer into their own names the sum of [ ], subject to the trusts of the said [*Will or Settlement*], and to receive the dividends now due and to accrue due thereon may be vested in the said [G. H.] and [I. J.] as the trustees thereof.

4. That the right to sue for and recover any chose in action subject to the trusts of the said [*Will or Settlement*] may vest in the said [G. H.] and [I. J.] as such trustees of the said [*Will or Settlement*].

5. That the costs of this application may be provided for.

Dated &c.

To [ ].

NOTE:—*The Order to be made on this summons is sought under Sections* [ ] *of The Trustee Act*, 1893.

This summons was taken out by [*of*] Solicitor for the above-named [ ].

The respondent may appear hereto by entering appearance either personally or by solicitor at the Central Office, Royal Courts of Justice, London.

Note.—If the respondent does not enter appearance within the time and at the place above mentioned, such order will be made and proceedings taken as the Judge may think just and expedient.

No. 16.

ORIGINATING SUMMONS for Service out of the Jurisdiction, or where Notice in lieu of Service is to be given out of the Jurisdiction. (Ord. 54, R. 4B.)

[*Title &c. as in No.* 14.]

Let [ ], of [ ], within [*here insert the number of days directed by the Court or Judge ordering the service or notice*] after service of this summons [or *notice of this summons*, as the case may be] on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of [ ], of [ ], in the county of [ ], who claims to be [*state the nature of the claim*] for the determination of the following questions:—[*State the questions.*]

Dated the [ ].

This summons was taken out by [ ], solicitor for the above-named [ ].

The defendant may appear hereto by entering appearance either personally or by solicitor at the Central Office, Royal Courts of Justice, London.

Note.—If the defendant does not enter appearance within the time and at the place above mentioned, such order will be made and proceedings taken as the Judge may think just and expedient.

N.B.—This summons is to be used where all the defendants are or one or more defendant or defendants is or are out of the jurisdiction. When the defendant to be served is not a British subject, and is not in British dominions, notice of this summons, and not the summons itself, is to be served upon him.

No. 17.

ORIGINATING SUMMONS not *inter partes* for Service out of the Jurisdiction, or when Notice in lieu of Service is to be given out of the Jurisdiction. (Ord. 54, R. 4B.)

[*Title &c. as in No.* 15.]

Let [ ], of [ ], within [*here insert*

the number of days directed by the Court or Judge ordering the service or notice] after service of this summons [*or* notice of this summons *as the case may be*] on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of [ ], of [ ], in the county of [ ], for an order that [*state the object of the application*].

Dated the [ ].

To [ ].

This summons was taken out by [ ], of [ ], solicitor for the above-named [ ].

The respondent may appear hereto by entering appearance either personally or by solicitor at the Central Office, Royal Courts of Justice, London.

Note.—If the respondent does not enter appearance within the time and at the place above mentioned, such order will be made and proceedings taken as the Judge may think just and expedient.

N.B.—This summons is to be used where all the respondents are or one or more respondent or respondents is or are out of the jurisdiction. When the respondent to be served is not a British subject, and is not in British dominions, notice of this summons, and not the summons itself, is to be served upon him.

No. 18.

NOTICE OF ORIGINATING SUMMONS in lieu of Service to be given out of the Jurisdiction. (Ord. 11, R. 10.)

[*Title &c. as in Nos.* 14 *or* 15.]

To C. D., of [ ].

Take notice that A. B., of [ ], has commenced a proceeding against you, C. D., in the Chancery Division of Her Majesty's High Court of Justice in England, by originating summons of that Court dated the [18],

which summons asks for the determination of the following questions [or *for the following relief*] [*copy in full the questions or the relief claimed*], and you are required within [*here insert the number of days directed by the Court or Judge ordering the notice*] days after the receipt of this notice, inclusive of the day of such receipt, to cause an appearance to be entered for you in the said Court to the said summons, and in default of your so doing the said [ ] may proceed therein, and such order may be made in your absence as to the Court shall seem just.

You may appear to the said summons by entering an appearance personally or by your solicitor at the Central Office, Royal Courts of Justice, London.

No. 19.

NOTICE OF APPOINTMENT to hear Originating Summons.
(Ord. 54, R. 4D.)

(*Title &c. as in Form No.* 14 *or* 15.)

To [*insert the name of the defendant or respondent*]. Take notice that you are required to attend at the chambers of Mr. Justice [ ], at the Royal Courts of Justice, at [ ] o'clock in the [ ]noon, for the hearing of the originating summons issued herein on the [ ] day of [18], and that if you do not attend in person or by solicitor at the time and place mentioned, such order will be made and proceedings taken as the Judge may think just and expedient.

(Signed)
Solicitor for the Plaintiff [or *Applicant*].

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,, 75	,,	100	-	-	-	0	10	0
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